United States Court of Appeals

for the Second Circuit

JOINT APPENDIX

ORIGINAL WITH PROOF OF SERVICE

76-7596

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

B

P/s

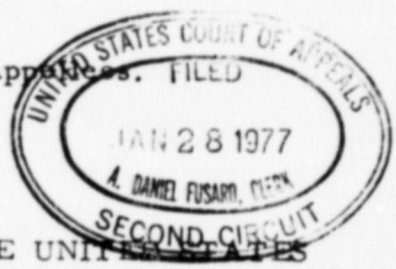
FRANK PASQUA,

Plaintiff-Appellant,

v.

NEW YORK CITY RETIREMENT SYSTEM; NEW YORK CITY DEPARTMENT OF CORRECTION and BENJAMIN J. MALCOLM, as Commissioner of the New York City Department of Correction,

Defendants-Appellees.



ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

APPENDIX

JOSEPH W. ALLEN
Attorney for Plaintiff-Appellant
299 Broadway - New York, New York 10007

W. BERNARD RICHLAND
Corporation Counsel
Attorney for Defendants-Appellees
Municipal Building - New York, New York 10007

(6041)

COUNSEL PRESS INC., 55 West 42nd Street, New York, N.Y. 10036 • PE 6-8460

PAGINATION AS IN ORIGINAL COPY

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DOCKET ENTRIES

DIST/OFFICE	DOCKET YR.	DOCKET NUMBER	FILING DATE MO.	DAY	YEAR	J	N/S	O	R	R 23	DEMAND $	OTHER	JUDGE NUMBER	JURY DEM.	DOCKET YR.	DOCKET NUMBER
208-1	76	1664	04	09	76	3	440	1					0842		76	1664

Judge Wyatt

PLAINTIFFS	DEFENDANTS
PASQUA, FRANK	NEW YORK CITY EMPLOYEES RETIREMENT SYSTEM; NEW YORK CITY DEPARTMENT OF CORRECTION and MALCOLM, BENJAMIN J., as Commissioner of the New York City Department of Correction,

11/29

CAUSE

CIVIL RIGHTS -- Deprive due process & valuable property rights. LS

ATTORNEYS

Joseph W. Allen
299 Bway, NYC 10007
349 6770

UNITED STATES COURT OF APPEALS
FILED
DEC 17 1976
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

12-15-76

☐ CHECK HERE IF CASE WAS FILED IN FORMA PAUPERIS	FILING FEES PAID DATE	RECEIPT NUMBER	C.D. NUMBER	STATISTICAL CARDS CARD	DATE MAILED
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				JS-6	X 10-29-76

UNITED STATES DISTRICT COURT DOCKET

DC-111 (Rev. 1/75)

A

DOCKET ENTRIES

Frank Pasqua vs. N.Y. City Retirement System, et al.

DATE	NR.	PROCEEDINGS Page #2 JUDGE WYATT
04-09-76	1	Filed Complaint and issued summons.
04-27-76	2.	Filed summons with marshals return. SERVED: N.Y.C. EMPLOYEES RETIREMENT SYSTEM on 4-19-76. SERVED N.Y.C. DEPT OF CORRECTION on 4-20-76. " :BENJAMIN J. MALCOLM on 4-20-76.
08-13-76	3	Filed Dfts. Memorandum of Law.
08-16-76	4	Filed Dfts. Notice of Motion & supporting affdvt. for order dismissing action. Ret. 9/10/76.
09-28-76	5.	Filed stip & order that defts motion to dismiss the complaint is extended to 10-8-76. Wyatt, J.
10-27-76	6.	Filed memo endorsed on motion filed 8-16-76. The motion is granted and the Clerk is directed to enter judgment in favor of defts dismissing the action. Wyatt, J.
10-29-76	7.	Filed Judgment that defts New York City Retirement System and N.Y.C. Dept of Correction have judgment against pltff Frank Pasqua dismissing the complaint. Clerk.
11-29-76	8.	Filed Notice that pltff hereby appeals to the U.S.C.A.P. from the final judgment dtd. 10-29-76.

A TRUE COPY
RAYMOND F. BURGHARDT, Clerk

By _____
Deputy Clerk

B

COMPLAINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FRANK PASQUA,

Plaintiff,

-against-

NEW YORK CITY EMPLOYEES RETIREMENT SYSTEM; NEW YORK CITY DEPARTMENT OF CORRECTION and BENJAMIN J. MALCOLM, as Commissioner of the New York City Department of Correction,

Defendants.

---

76 CIV. 1664

COMPLAINT

Civil Action

JUDGE WYATT

Plaintiff, by his attorney, JOSEPH W. ALLEN, complaining of the defendants herein, upon information and belief, alleges:

1. Jurisdiction is conferred upon this Court by 28 U.S.C. 1343(3) and 1343(4), providing for jurisdiction in this Court for an action to redress the deprivation, under color of state law, of rights, privileges and immunities guaranteed by the Constitution of the United States.

2. This is an action seeking redress for the deprivation of the Constitutional rights of the plaintiff as secured under and guaranteed by the Fourth, Fifth, Sixth, Eight and Fourteenth Amendments to the United States Constitution.

3. This Court is authorized by 42 U.S.C. 1983 to grant the relief herein prayed for.

4. The plaintiff, Frank Pasqua, is a citizen of the United States and the State of New York presently residing at 1234 Kearney Avenue, Bronx, New York.

5. Plaintiff was for twenty-two (22) years employed by the City of New York in the Correction Department and has

served, except for the Charges herein after complained of, therein with an unblemished record.

6. The defendant, New York City Department of Correction, was and still is a department organized and existing under the applicable laws of the City and State of New York and at all times hereinafter referred to, the respondent Benjamin J. Malcolm, was and still is the Commissioner of the Department of Corrections of the City of New York.

7. That the New York City Employees Retirement System is duly authorized by the provisions of the New York City Administrative Code and are the Trustees of the pension funds for members thereof.

8. Upon his initial employment with the New York City Department of Correction, the plaintiff became a member of the New York City Retirement System and during his entire tenure of office made all the necessary payments into the pension fund of said retirement system and was at the time of the service of the Charges hereinafter complained of, entitled by virtue of length of service to retire pursuant to the provisions of the New York City Administrative Code. (Section B3-36.3).

9. The pension rights thus vested in the plaintiff are contractual in nature by virtue of the New York State Constitution Article V Section 7.

Article V Section 7 reads as follows:

"§7. [Membership in retirement systems; benefits not to be diminshed nor impaired]

After July first, nineteen hundred forty, membership in any pension or retirement system of the state

or of a civil division thereof shall be a contractual relationship, the benefits of which shall not be diminished or impaired."

10. A complete statement of the material and relevant facts is contained in the supporting affidavit of Frank Pasqua attached hereto and marked Exhibit "A".

FIRST CAUSE OF ACTION

11. Plaintiff alleges that the defendants willfully violated his Sixth Amendment rights under the United States Constitution in that they denied plaintiff an opportunity to face his accusers, to have his accusers cross-examined and deprived him of effective use of counsel. Plaintiff further alleges that the defendants did this in an effort to deprive plaintiff of his right to due process and to further deprive plaintiff of valuable property rights in the nature of a pension which had vested in plaintiff by virtue of his length of service with the City of New York.

SECOND CAUSE OF ACTION

12. Plaintiff alleges that the defendants willfully violated his Fifth Amendment guarantee against self-incrimination and did this in order to deprive him of his due process guarantees and to further deprive him of valuable property rights in the nature of a pension which had vested in plaintiff by virtue of his length of service with the City of New York.

THIRD CAUSE OF ACTION

13. Plaintiff alleges that the defendants willfully proceeded in excess of their jurisdiction in that with full knowledge that a criminal investigation was being pursued by the District Attorney of Bronx County and with full knowledge that the plaintiff was a target of such criminal investigation and with full knowledge that plaintiff was on the eve of his retirement, defendants nonetheless sought to coerce and elicit testimony from the plaintiff under the guise of a non-existent employer-employee relationship all in violation of plaintiff's due process rights under the Sixth Amendment to the United States Constitution and plaintiff's right against self-incrimination under the Fifth Amendment to the United States Constitution. Plaintiff further alleges that defendants' sole purpose was to deprive him of valuable property rights in the nature of a pension which had vested in him by virtue of his length of service as an employee of the City of New York.

FOURTH CAUSE OF ACTION

14. Plaintiff alleges that defendants engaged in an illegal search by eavesdropping in violation of his rights under the Fourth Amendment to the United States Constitution and the defendants did this in an effort to deprive plaintiff of valuable property rights in the nature of a pension which had vested by virtue of his length of service with the City of New York.

COMPLAINT

FIFTH CAUSE OF ACTION

15. Plaintiff alleges that the defendants violated his rights under the Eighth Amendment to the United States Constitution in that they unlawfully imposed an excessive penalty and that defendants did this in order to deprive plaintiff of valuable property rights in the nature of a pension which had vested in plaintiff by virtue of his length of service with the City of New York.

SIXTH CAUSE OF ACTION

16. Plaintiff alleges that the defendants denied him his right to an effective appeal under the laws of the State of New York in that the recommendation of dismissal for alleged infractions of Rules and Regulations was not supported by findings of fact and conclusions of law.

17. Plaintiff alleges that the actions of the defendants has operated and will continue to operate to his detriment and damage in that he has been deprived of pension rights valued at approximately $150,000.00.

WHEREFORE, plaintiff respectfully prays that this Court

A. advance this case on the docket;

B. order a hearing at the earliest appreciable date and upon such hearing,

1. Declare the dismissal of the plaintiff to be in violation of his rights and privileges under the United States Constitution and, therefore, null and void, and to further declare;

COMPLAINT

2. That the plaintiff's pension has vested effective April 19, 1973; and to

3. Then direct the defendant, New York City Retirement System, to pay to the plaintiff his pension benefits retroactive to the date of his illegal dismissal and to continue to pay to the plaintiff his pension payments as set forth in the New York City Administrative Code.

Plaintiff further prays that this Court grant plaintiff his costs, reasonable attorney's fees and such additional or alternative relief as may appear to the Court to be equitable, reasonable and just.

Dated: New York, New York
April 7, 1976.

Joseph W. Allen

JOSEPH W. ALLEN
Attorney for Plaintiff
299 Broadway
New York, New York 10007
349-6770

EXHIBIT "A" TO COMPLAINT - AFFIDAVIT OF FRANK PASQUA, PLAINTIFF, IN SUPPORT OF COMPLAINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

FRANK PASQUA,

Plaintiff,

AFFIDAVIT

-against-

NEW YORK CITY EMPLOYEES REITREMENT SYSTEM; NEW YORK CITY DEPARTMENT OF CORRECTION and BENJAMIN J. MALCOLM as Commissioner of the New York City Department of Correction,

Defendants.

----------X

STATE OF NEW YORK)
ss.:
COUNTY OF NEW YORK)

FRANK PASQUA, being duly sworn, deposes and says:

1. I am the plaintiff in the above captioned proceeding and make and submit this affidavit in support of the relief requested in the complaint.

2. I served in the New York City Department of Correction in excess of twenty (20) years and prior to the Charges herein complained of was never the subject of any disciplinary action whatsoever.

3. That upon entry into the service of The City of New York, I became a member of the New York City Employees' Pension System, selected a twenty year retirement option and made all the required payments into the pension fund.

4. That on or about December 29, 1972, I was subpoened to the Grand Jury of Bronx County and was interviewed and questioned by Assistant District Attorney Epstein. At this time, I

appeared without counsel and answered all questions thoroughly and to the best of my recollection. The nature of the questions clearly indicated that the investigation posed a distinct possibility that I was a target and could be subjected to criminal prosecution.

5. Although innocent of any wrongdoing, in light of all the circumstances and the valuable pension rights that had already accrued to me by operation of law, I consulted with my family and decided to submit my application for retirement. On or about January 22, 1973, I informed my immediate superior, Warden Cunningham, that I was submitting my application for retirement and on that date surrendered my shield (Badge No. 214), hat pieces and identification card No. 1146.

6. On the next day, January 23, 1973, I was suspended from duty, without pay, notwithstanding the fact that I had not been served with any Charges and Specifications. At this juncture I was led to believe that I would not be permitted to return to my employment, would not receive any terminal leave and would be retired by operation of law.

7. Thereafter on or about February 5, 1973, despite my suspension and imminent retirement, I was subpoened to appear befor the Commissioner of Investigation and upon responding to such subpoena, was informed that I was to be questioned under the guise of the employer-employee relationship. I requested time to obtain counsel and my appearance was rescheduled for February 7, 1973.

EXHIBIT "A" TO COMPLAINT - AFFIDAVIT OF FRANK PASQUA, PLAINTIFF, IN SUPPORT OF COMPLAINT

8. On February 7, 1973, still under subpoena, I returned to the Department of Investigation with my attorney, Saverio A. Muchio. At this time, upon advice of counsel, I refused to answer questions upon the grounds that I was a target of a possible criminal investigation and that the Commissioner of Investigation lacked power to grant me immunity and that the alleged employer-employee questioning was not only illegal in light of the foregoing circumstances but also on the grounds that there was no employer-employee relationship then existing.

9. It was not until early March, 1973, that I was informed of the charges against me by the Department of Correction and shortly thereafter I prepared the necessary forms to finalize my retirement.

10. On or about March 15, 1973, I was directed to appear before Charles J. Kemins, Hearing Officer for the Department of Correction to answer the Charges and Specifications lodged against me.

11. A hearing commenced and was continued on March 27, 1973.

12. I have been informed by my attorney and verily believe that the Hearing was defective in that I was never confronted by my accusers, never given the opportunity to cross-examine my accusers, denied the effective use of counsel and denied other basic and substantial constitutional rights and privileges accorded me by the relevant decisional law as set forth in the United States Supreme Court decisions viz; Garrity v. State of New Jersey, 385 US 493, 17 L Ed 2d 562, 87 S Ct 616;

EXHIBIT "A" TO COMPLAINT - AFFIDAVIT OF FRANK PASQUA, PLAINTIFF, IN SUPPORT OF COMPLAINT

Gardner v. Broderick, 392 US 273, 20 L Ed 2d 1089, 88 S Ct 1917; Uniformed Sanitation Mens Association, Inc., et al v. Commissioner of Sanitation of The City of New York, 392 US 280, 20 L Ed 2d 1089, 88 S Ct 1917.

The hearing was further polluted by the introduction of alleged tape recordings in violation of all the rules of evidence.

13. On or about April 17, 1973, I was informed that as a result of the aforementioned hearing, I had been dismissed from my position as Captain of Correction with the New York City Correction Department.

14. I have been informed by my attorney and verily believe that my dismissal was unlawful, arbitrary and capricious in that my pension had already vested by operation of law and that dismissal was based on a mere recommendation of the Hearing Officer who provided the respondent Commissioner Benjamin J. Malcolm with no findings of fact or conclusions of law to support said recommendation of dismissal.

WHEREFORE, I submit this affidavit and attached exhibits in support of the relief requested in the complaint.

Sworn to before me this
1st day of April, 1976.

JOHN OSMA
Notary Public, State of New York
No. 31-4522691
Qualified in New York County
Commission Expires March 30, 19...

Frank Pasqua
FRANK PASQUA

EXHIBIT TO PASQUA AFFIDAVIT - SUBPOENA TO APPEAR BEFORE COMMISSIONER OF INVESTIGATION

Subpoena

#2916/72

CITY OF NEW YORK

DEPARTMENT OF INVESTIGATION
111 JOHN STREET
NEW YORK, N. Y. 10038

To Frank Pasqua
1234 Kearney Avenue
Bronx, N.Y.

Greetings

You are hereby commanded to appear and attend before the Office of the Department of Investigation of the City of New York at 111 John Street, Borough of Manhattan, City of New York, on the 5th day of February, 19 73, at 2 o'clock in the after noon and at any recessed or adjourned date thereof, to testify under oath in the matter of an investigation relating to the affairs, functions, accounts, methods, efficiency or personnel of the Department of Correction of the City of New York, now being conducted before the Commissioner of Investigation pursuant to Chapter 34 of the Charter of the City of New York, AND, FOR A FAILURE TO COMPLY HEREWITH, an application will be made to the Supreme Court of the State of New York to compel compliance, and to impose costs, and for the issuance of a warrant directing a Sheriff to bring you before the undersigned; and you may also be subject to such other penalties and proceedings as are prescribed by law.

Witness my hand, this 1st day of February 19 73.

/S/ NICHOLAS SCOPPETTA

Commissioner of Investigation of the City of New York

Any inquiry concerning this subpoena should be made of

Deputy Commissioner S.N. Lupkin

No. 73-59

COrtlandt 7-6000, 111 John Street, New York, N. Y. 10038

Enforcement pursuant to the Civil Pratice Law and Rules, Sec. 2305(a): The Witness is bound by this Subpoena to appear at the Hearing or Examination and at any recessed or adjourned date thereof.

EXHIBIT TO PASQUA AFFIDAVIT - RECEIPT FOR SURRENDER OF PERSONAL PROPERTY

6008 (12-71) 2000f

Department of Correction — Interdepartmental Memorandum

Date : Jan. 22, 1973

From : A/D/W A/ Jenkins #44

To : Capt. F. Pasqua

Subject : SURRENDER OF PERSONAL PROPRERTY

The following departmental property was received this date .

1 Shield # 214

2 Hat Pieces

1 I.D. Card # 1146

Alexander Jenkins, ADW #44

EXHIBIT TO PASQUA AFFIDAVIT - NOTICE OF DISMISSAL

DEPARTMENT OF CORRECTION
City of New York

DATE: April 16, 1973

FROM: OFFICE OF THE TRIAL COMMISSIONER

TO: Director of Operations, Central Office

SUBJECT: DISPOSITION OF DEPARTMENTAL DISCIPLINARY CHARGES

DISCIPLINARY RECORD NUMBER - #42/1973

1. At a hearing in the office of the TRIAL COMMISSIONER on March 15 & 27, 1973, disciplinary charges perferred against the following named member of your command were disposed of as follows

Name, Shield or I.D. No.	Date of Charges	Findings	DISPOSITION
Frank Pasqua Captain, #214	2-8-73	Spec. #1 Plea of not guilty. Found not guilty after trial. Spec. #2 Plea of not guilty. Found guilty after trial. Spec. #3 Plea of not guilty. Found guilty after trial. Spec. #4 Plea of not guilty. Found guilty after trial.	CHARGE DISMISSED

"Dismissed from the Department of Correction, City of N.Y., Close of business, April 16, 1973."

2. Date dispatched from Central Office: April 16, 1973

Date received at institution: _____

Date received by employee: _____

_____
Employee's signature

_____
Witnessed by: Name Rank

3. The above disposition (s) will be published in Departmental Special Orders at a later date.

Charles J. Kemins
CHARLES J. KEMINS
Trial Commissioner

cc: Director of Personnel
Attorney for Respondent
Employee's folder

NOTICE OF MOTION TO DISMISS COMPLAINT

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

FRANK PASQUA, Plaintiff, v. NEW YORK CITY RETIREMENT SYSTEM; NEW YORK CITY DEPARTMENT OF CORRECTION and BENJAMIN J. MALCOLM, as Commissioner of the New York City Department of Correction, Defendants.	NOTICE OF MOTION 76 Civ. 1446 I.B.W.

S I R S :

PLEASE TAKE NOTICE that on the 10th day of September, 1976, at 2:30 p.m. in the afternoon, a motion will be made, at the United States Court For The Southern District of New York, Foley Square, New York, New York, pursuant to Rule 12(b)1,6) F.R.C.P. for an order dismissing the above-encaptioned matter.

Yours, etc.,

W. BERNARD RICHLAND,
Corporation Counsel,
City of New York,
Municipal Building,
New York, New York 10007.

TO:

JOSEPH ALLEN, ESQ.
299 Broadway
New York, New York

AFFIDAVIT OF DONALD J. TOBIAS, FOR DEFENDANTS, IN SUPPORT OF MOTION

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

FRANK PASQUA, Plaintiff, v. NEW YORK CITY RETIREMENT SYSTEM; NEW YORK CITY DEPARTMENT OF CORRECTION and BENJAMIN J. MALCOLM, as Commissioner of the New York City Department of Correction, Defendants.	AFFIDAVIT 76 Civ. 1446 I.B.W.

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

DONALD J. TOBIAS, being duly sworn, deposes and says that:

1. I am an Assistant in the Office of W. BERNARD RICHLAND, Corporation Counsel of The City of New York, attorney for the defendants in the above encaptioned matter. This affidavit is submitted in support of defendants' motion to dismiss the complaint.

2. Plaintiff, a former Captain in the New York City Department of Correction has commenced this action, pursuant to 42 USC 1983, whereby he seeks an order granting him re-instatement to his former position as well as retroactive pension rights. It is clear however, that the six "causes of action", and the improperly annexed supporting affidavit fail to set forth facts sufficient to establish a claim under the civil rights statutes, and that, in any event, the operative facts under the complaint are frivolous in the extreme.

3. It must be noted at the outset that plaintiff, a former uniformed officer employed by the Department of Correction was served, in February, 1973, with several charges

and specifications involving misconduct in his role as Correction Captain. Specification 4 involved the charge that plaintiff had refused to testify before the New York City Department of Investigation. (A copy of the charges and specifications are annexed hereto as Exhibit 1)

4. On March 15, 1973 plaintiff was afforded a Departmental hearing on all of the aforementioned charges and specifications. (A copy of the trial transcript is annexed as Exhibit 2). At his Departmental hearing,plaintiff was, at all stages,represented by counsel, a fact clearly apparent from even a cursory examination of the trial transcript.

5. On April 13, 1973,plaintiff was found guilty of three of the four charges and was thereupon dismissed from the Department.

6. In July of 1973, the plaintiff commenced a special proceeding,pursuant to Article 78 of the New York State CPLR in which he alleged, among other things: a) that evidence received as a result of the utilization of a bugging device did not adequately substantiate the Department's charges, (See paragraphs "NINTH" and "TENTH" of the Article 78 petition, annexed as defendants Exhibit 3), b) that the Department's principal witness had no personal knowledge of the events in question (See Paragraph "ELEVENTH" of exhibit 3-annexed hereto), c) that there was no reasonable or plausible basis for the determination by the Department (See Paragraph "FIFTEENTH" of defendants Exhibit 3) d)that the determination was grossly disproportionate to plaintiff's offense (See Paragraph "FIFTEENTH"of defendants Exhibit 3) and e) that the basis for the determination was "the alleged wire tap evidence with no corroboration whatsoever" and "the refusal(of the plaintiff) to testify before the Department of Investigation"

AFFIDAVIT OF DONALD J. TOBIAS, FOR DEFENDANTS, IN SUPPORT OF MOTION

(See Paragraph "SEVENTEENTH" of defendant's Exhibit 3).

7. In his Article 78 petition, petitioner urged that "the basis for imposing the penalty of dismissal is disproportionate to the offense and constitutes a violation of the petitioners' Constitutional Rights. (Paragraph "SEVENTEENTH", defendant's Exhibit 3, emphasis supplied).

8. Plaintiff, in bringing this matter before the New York Courts thus raised identical constitutional questions presented by the instant action. Plaintiff's State Court brief (annexed hereto as defendant's Exhibit 4) asserted, at Point I that:

> a) "Petitioner was unlawfully discharged refusing to answer questions posed by the City Commissioner of Investigation in reliance upon his privilege against self-incrimination because under State law, the Commissioner lacked power to confer immunity (Defendants Exhibit 4, p. 6).

at Point II that:

> b) The New York Statutory scheme for conferring immunity is void for vagueness and violates the Due Process Clause of the Federal and State Constitution if it permits discharge of the Petitioner for refusing to answer questions asked by the City Commissioner of Investigation on grounds of self-incrimination.

at Point III that:

> c) "Respondents' determination was, on the entire record, not supported by substantial evidence.

at Point IV that:

> d) The Penalty imposed against the Petitioner was excessively harsh..."

and at Point V that:

> e) Evidence in support of specifications two and three was based upon unlawful eaves-dropping.

9. Plaintiff's State Court proceeding, which had duly transferred to the Appellate Division, First Department, was unanimously dismissed on the 13th day of May, 1975.

10. It is clear then, that all of the causes of action set forth by the plaintiffs in the instant complaint have been thoroughly briefed and considered by the State Courts, and that the invocation of the doctrine of res judicata is required.

11. In addition to the fact that the instant complaint has already been thoroughly litigated, plaintiff's claims set forth no substantive basis for relief. Regarding the claim that the plaintiff's rights were prejudiced by the proceeding before the City Department of Investigation, (Plaintiff's "FIRST", "SECOND" and "THIRD" causes of action the transcript of that proceeding (annexed hereto as Exhibit 5) demonstrates quite clearly that the plaintiff was afforded use immunity in accordance with the applicable decisional law.

12. Regarding plaintiff's "eavesdropping" claim, ("FOURTH" cause of action) plaintiff, while conclusorily stating that he was victimized by an "illegal search" has failed to set forth facts sufficient to support such a conclusion.

13. Plaintiff's assertion that he was "denied an effective right to an appeal" ("SIXTH" cause of action), is somewhat startling in view of the extensive State Court proceedings that have been completed.

14. Finally, it must be noted that plaintiff has erroneously included, as parties defendant, the New York City Retirement System as well as the Department of Correction.

WHEREFORE, the action should be dismissed, in all respects.

Sworn to before me this
day of August, 1976.

Donald J. Tobias
DONALD J. TOBIAS

DONALD M. NUSSBAUM
Notary Public, State of New York
No. 31-4517266
Qualified in New York County
Commission Expires March 30, 1978

Donald M. Nussbaum

EXHIBIT "1" TO MOTION - CHARGES AND SPECIFICATIONS

THE CITY OF NEW YORK

DEPARTMENT OF CORRECTION

4-17-75

Findings and Recommendations of Charges and Specifications AGAINST

File No.

Case No. DP-12

Book No. Page

Captain Frank Pasqua	#214	N.Y.C.C.I.F.M.	7-1-70
Rank or Title — NAME	Shield or Pass No	Institution Bureau or Unit	Date Appointed

—By—

Director of Operations	Joseph D'Elia	Central Office
Rank or Title	NAME	Inst. Bureau or Unit

February 6, 1973	March 15, 1973	March 27, 1973
Date of Charges	Trial Commenced	Trial Concluded

ADJOURNMENTS: None

EXAMINED BY CHARLES J. KENTIS, Trial Commissioner

CHARGES

VIOLATION OF RULES AND REGULATIONS

SPECIFICATIONS

1. The said captain did agree to serve as an intermediary in a bribery scheme whereby a sum of money ($5,000.00) was to be obtained by the said captain from one Joseph Denti for the purpose of securing the conditional release of inmate Thomas "Toto" Marino from the New York City Correctional Institution for Men. Rules: 3.8; 5.9; 5.14; 5.33; 5.54; 5.12A; 6.13.

2. The said captain did provide favored treatment to inmate Aniello Dellacroce, #772-3382, by arranging for an unauthorized visit by his minor daughter, Annette Dellacroce and a friend, Rosemary Connelly between September 5, 1972 and November 20, 1972 under pass #10643, the said captain knowingly filing false documents to facilitate the said visits. Rules: 5.9; 5.14; 5.12A.

PAGE #1

FINDINGS AND RECOMMENDATIONS

DATE April 13, 1973

ON CHARGES

VIOLATION OF RULES, ETC.

ON SPECIFICATIONS

1. Plea of not guilty. Found not guilty after trial. Charge Dismissed.

2. Plea of not guilty. Found guilty after trial.

DISPOSITION Dismissed from the Department of Correction, City of N.Y., Close of business April 16, 1973.

CHARLES J. KENTIS
Trial XXXXXX COMMISSIONER

ACTION OF THE COMMISSIONER

April 16, 1973 — DATE

SEE OTHER SIDE - OTHER CHARGES

BENJAMIN J. MALCOLM
COMMISSIONER OF CORRECTION

EXHIBIT "1" TO MOTION - CHARGES AND SPECIFICATIONS

[illegible] DISCIPLINARY RECORD:

[illegible] - September 22, 1952 - Workhouse Div., D.C.

Spec. #1 - Refused in a loud and insolent manner in the presence of other correction officers to obey a lawful order to remain on duty for the 12 midnight to 8 a.m. tour of duty on Sept. 21, 1952, and did leave the confines of the Workhouse Division without being properly relieved by a superior officer.

PLEA: - Plea of guilty to that part of specification dealing with his refusal to obey a lawful order. Found guilty after trial of this portion of specification. Plea of not guilty to that part of the specification, "in a loud and insolent manner." Found not guilty on this portion of specification after trial. REPRIMAND.

EXHIBIT "1" TO MOTION - CHARGES AND SPECIFICATIONS

THE CITY OF NEW YORK

DEPARTMENT OF CORRECTION

File No.

Case No. Con't'd.

Book No. Page

Findings and Recommendations of Charges and Specifications AGAINST

Captain	Frank Pasqua	-	-	-
Rank or Title	NAME	Shield or Pass No.	Institution Bureau or Unit	Date Appointed

—By—

Rank or Title	NAME	Inst. Bureau or Unit

Date of Charges	Trial Commenced	Trial Concluded

ADJOURNMENTS

EXAMINED BY

CHARGES

VIOLATION OF RULES AND REGULATIONS

SPECIFICATIONS

3. The said captain did provide favored treatment to inmate Aniello Dellacroce, #772-3382, between August and November, 1972 in return for a case of liquor the said captain received from one Joseph Denti. Rules: 5.8; 5.9; 5.14; 5.33; 5.54; 5.124; 6.13.

4. Having been officially summoned to appear and give testimony before the Department of Investigation on February 7, 1973 concerning his official duties, the said captain did refuse to testify. Rule: 5.123A.

PAGE #2

FINDINGS AND RECOMMENDATIONS

DATE April 13, 1973

ON CHARGES

VIOLATION OF RULES, ETC.

CONTINUED

ON SPECIFICATIONS

3. Plea of not guilty.
Found guilty after trial.

4. Plea of not guilty.
Found guilty after trial.

DISPOSITION Dismissed from the Department of Correction, City of N.Y., Close of business April 16, 1973

DEPUTY COMMISSIONER

ACTION OF THE COMMISSIONER

April 16, 1973
DATE

COMMISSIONER OF CORRECTION

EXHIBIT "2" TO MOTION - TRANSCRIPT OF DEPARTMENTAL TRIAL

DEPARTMENT OF CORRECTION
CITY OF NEW YORK

- -x

In the Matter of the

Disciplinary Hearing of

FRANK PASQUA,

Respondent.

- -x

100 Centre Street,
New York, New York.
March 15, 1973,

B E F O R E :

HON. CHARLES J. KENNINS, The Hearing Officer.

ACME REPORTING SERVICE
SHORTHAND AND STENOTYPE REPORTERS
NOTARIES PUBLIC
140 NASSAU STREET
NEW YORK CITY
TELEPHONES: BEEKMAN 3-0664-0665-0666

EXHIBIT "2" TO MOTION - TRANSCRIPT OF DEPARTMENTAL TRIAL

A P P E A R A N C E S :

[illegible], Director of Legal Affairs,
Department of Corrections.

[illegible], MARCHESE & MACDONALD, ESQS.,
Counsel for the Respondent,
401 Broadway,
New York, New York.
BY: RAVERIO A. MARCHESE, ESQ., of Counsel.

MICHAEL P. DOWNEY, District Attorney for the Bronx.

Also Present:

FRANK MURRAY, Detective, N.Y.P.D. Shield #695,
Department of Investigation.

FRANK PASQUA, Respondent.

- - -

PROCEEDINGS

THE HEARING OFFICER: Mr. Pasqua, will you please rise?

F R A N K P A S Q U A, the respondent, being first duly sworn, was examined and testified as follows:

THE HEARING OFFICER: Please be seated, and give your name, rank and shield number.

THE WITNESS: Frank Pasqua, Captain, shield No. 214.

THE HEARING OFFICER: How long have you been a member of the department?

EXHIBIT "2" TO MOTION - TRANSCRIPT OF DEPARTMENTAL TRIAL

THE WITNESS: Twenty-two and a half years.

THE HEARING OFFICER: What institution are you now assigned to?

THE WITNESS: New York City Correctional Institution for Men.

THE HEARING OFFICER: And how long were you assigned, sir?

THE WITNESS: Since it opened.

THE HEARING OFFICER: Is this your first assignment? This is not your first assignment, is it?

THE WITNESS: No, no.

THE HEARING OFFICER: How many years at this institution?

THE WITNESS: About eight years.

THE HEARING OFFICER: Where were you assigned prior to that?

THE WITNESS: The Tombs, right here.

THE HEARING OFFICER: How long were you there?

THE WITNESS: Three years, two years, three.

THE HEARING OFFICER: And prior to that?

THE WITNESS: Prior to that I was at

EXHIBIT "2" TO MOTION - TRANSCRIPT OF DEPARTMENTAL TRIAL.

the Riker's Island and also at the Pen before that, and I was at the Hart's Island, working at Hart's Island.

THE HEARING OFFICER: Were you served with a copy of the charges?

THE WITNESS: Yes, sir.

THE HEARING OFFICER: Were you served at least eight days prior to today?

THE WITNESS: Yes, sir.

THE HEARING OFFICER: Do you wish to be represented by an attorney at this hearing?

THE WITNESS: Yes, sir.

THE HEARING OFFICER: Is the gentleman with you your attorney?

THE WITNESS: Yes, sir.

THE HEARING OFFICER: Will you please state your name and address for the record.

MR. MUSCHIO: Muschio,Weingard & Broudny, by Saverio Muschio.

THE HEARING OFFICER: Now, you give Counsel for the Department your attention, and he will read the charges against you and ask you for your plea, and you may answer personally or

through your attorney.

Proceed, Mr. Zweibel.

MR. ZWEIBEL: I will now read the charges and specifications entered into the department record, No. 42, dated February 8, 1973.

The specifications are as follows:

No. 1: The said captain did agree to serve as an intermediary in a bribery scheme whereby a sum of money ($5,000.00) was to be obtained by the said captain from one Joseph Denti for the purpose of securing the conditional release of inmate Thomas "Toto" Marino from the New York City Correctional Institution for Men.

THE HEARING OFFICER: How do you plead to that specification?

You may plead guilty, not guilty or guilty with an explanation.

How do you plead to that?

MR. MUSCHIO: Not guilty, and for the purpose of expedition, we waive any further reading of any other specifications, and plead for all of them not guilty, as for any and all

EXHIBIT "2" TO MOTION - TRANSCRIPT OF DEPARTMENTAL TRIAL

specifications served on this respondent.

MR. ZWEIBEL: No objections.

I will begin at this point with the presentation of evidence.

I call the first witness, Detective Frank Munari.

He is presently assigned to the Department of Investigation, and, additionally, I would like, if there is no objection, tobegin with the fourth charge here, because of continuity.

MR. MUSCHIO: I have no objection.

MR. ZWEIBEL: How do you spell your name?

DET. MUNARI: Munari, M-u-n-a-r-i, 695.

And that is Detective, not Captain.

F R A N K M U N A R I, being first duly sworn, was examined and testified as follows:

THE HEARING OFFICER: Please be seated, and first, your name,rank and shield number.

THE WITNESS: Detective Frank Munari —

THE HEARING OFFICER: Where are you assigned?

THE WITNESS: Department of Investigation, Squad 11, on John Street, New York, Commissioner, New York City.

EXHIBIT "2" TO MOTION - TRANSCRIPT OF DEPARTMENTAL TRIAL

THE HEARING OFFICER: Department of Investigation?

THE WITNESS: Yes, sir.

THE HEARING OFFICER: How long a time have you been assigned to this position?

THE WITNESS: Approximately five years.

THE HEARING OFFICER: And now, in this matter, you have been called as a witness on behalf of the Department, to testify on the charges which are pending against the captain, the respondent.

Mr. Zweibel is representing the Department, and will ask you various questions regarding the charges and, thereafter, Mr. Muschio, who represents the captain respondent, will also put questions to you.

Please cooperate with both of them.

THE WITNESS: Yes, sir.

EXAMINATION BY

MR. ZWEIBEL:

Q Det. Munari, I call your attention to February 2, 1972. Did you have occasion to serve a subpoena upon Cpt. Frank Pasqua?

A Yes, sir.

Q What was the purpose of this subpoena?

A To have him appear before the Department of Investigation, who was investigating at that time a parole corruption --

MR. MUSCHIO: I am going to object to any purpose as to what it is for. I don't think it is relevant to this hearing.

MR. ZWEIBEL: I take exception to that. I think it is very relevant.

THE HEARING OFFICER: At this time, I am going to let this proceed for the purpose of investigation within the Department of Correction.

Q Was this a duly authorized subpoena?

A Yes, sir.

Q When was it made? When was it returnable for?

A It was made returnable for February 5, 1972.

Q Did a hearing take place on that date?

A There was ahearing on that date, but it was adjourned to February 7th.

Q Did this hearing take place on February 7,

1973?

A Yes, sir.

Q Was it approximately at 2:05 P.M. the hearing began?

A Yes, sir.

Q Who was present at this hearing?

A I was present, Cpt. Frank Pasqua, his attorney, and also Commissioner Lupkin of the Department of Investigation, anda reporter by the name of Mr. Whitelaw of the Department of Investigation.

MR. MUSCHIO: I believe there was some allusion that the subpoena was 1972.

THE WITNESS: No, '73.

MR. MUSCHIO: You say '73?

THE WITNESS: Yes, sir.

MR. ZWEIBEL: Off the record.

(Discussion off the record.)

Q Additionally, was Mr. Muschio, the attorney for Mr. Pasqua , present?

A Yes, sir.

Q This hearing was conducted by Mr. Lupkin, the Deputy Commissioner, isn't that correct?

A Yes, sir.

EXHIBIT "2" TO MOTION - TRANSCRIPT OF DEPARTMENTAL TRIAL

MR. ZWEIBEL: Will you stipulate at this time, Mr. Muschio, that Mr. Lupkin was duly authorized to administer the oath, and that the oath was administered pursuant to Chapter 34 of the New York City Charter?

MR. MUSCHIO: Yes, sir.

MR. ZWEIBEL: And that the oath was administered to Frank Pasqua?

MR. MUSCHIO: Yes, sir.

MR. ZWEIBEL: You also stipulate that Mr. Pasqua was advised of his rights, fully advised of his rights, and he understood the nature of those warnings?

MR. MUSCHIO: Right.

BYMR. ZWEIBEL:

Q Det. Munari, were you present throughout this hearing on that date?

AYes, sir.

MR. MUSCHIO: Mr. Commissioner, may I interrupt for a moment. I think in all fairness, I should have a copy of the transcript.

MR. ZWEIBEL: I will give it to you right now, and I will be referring to pages 11 to 17

of the hearing minutes.

At this time I will turn to page 11.

Approximately two thirds of the way down the page, I will pose the following question to you:

Q Det. Munari, Commissioner Lupkin asked this question of Capt. Pasqua.

"How long have you been with the New York City Department of Corrections?"

And I ask that following the statement by Mr. Muschio, did the witness, Mr. Frank Pasqua, give this answer?

"I am not going to answer any questions." And I am now reading from page 12.

A Yes, he gave that answer.

MR. MUSCHIO: Excuse me, but in all fairness, I believe you ought to propound the next question and response, so to clearly make known the respondent's position as to why he didn't answer the question.

MR. ZWEIBEL: I will start then from the beginning.

THE HEARING OFFICER: What page?

EXHIBIT "2" TO MOTION - TRANSCRIPT OF DEPARTMENTAL TRIAL

MR. ZWEIBEL: Page 11.

BY MR. ZWEIBEL:

Q Capt. Pasqua, how long have you been with the New York City Department of Correction?

MR. MUSCHIO: We are not going to answer any questions --

MR. ZWEIBEL: If there is no objection, Mr. Muschio, I will read page 11 to 17 to put this in evidence, and then I will pose the question to Det. Frank Munari.

THE WITNESS: Those are questions and answers.

THE HEARING OFFICER: Why do you have to read it?

MR. ZWEIBEL: If there is no objection --

MR. MUSCHIO: Off the record.

(Discussion off the record.)

MR. ZWEIBEL: So, with no objection, we will put the pertinent sections in.

Off the record.

(Discussion off the record.)

THE HEARING OFFICER: Mr. Zweibel, put the entire transcript in, and then once it is

in, you can do what you want to do.

MR. ZWEIBEL: There is no objection to that.

THE HEARING OFFICER: All right, then, we can even mark it in evidence as Department Exhibit 1.

MR. ZWEIBEL: There is a stipulation that this is a true and accurate transcript, is that correct?

MR. MUSCHIO: If it is signed by the gentleman that is the reporter --

THE HEARING OFFICER: Off the record.

(Discussion off the record.)

Proceed, Mr. Zweibel.

MR. ZWEIBEL: Before I go on to the next specification, I have one final question with respect to this particular transcript.

Q Det. Munari, was Mr. Frank Pasqua questioned at this hearing with regard to the facts concerning related activity?

A Yes, sir.

THE HEARING OFFICER: It is in the testimony?

MR. ZWEIBEL: That is correct.

Q Det. Munari, to your knowledge, was a bug installed in the home of Correction Officer Richard

EXHIBIT "2" TO MOTION - TRANSCRIPT OF DEPARTMENTAL TRIAL

Curio at 2566 Morgan Avenue, County of Bronx, on February 14, 1972, at approximately 7:20 A.M.?

A Yes, sir.

Q Will you describe the nature of this bug and how it operates?

A The bug is a transmitter that was operating off electric currents already in Mr. Curio's house and monitored in a receiver which was outside the house.

It is a wireless, and that is a typical bug, which is called a Kel.

MR. ZWEIBEL: We are now going to proceed on Specification No. 2.

The said captain did provide favored treatment to inmate Aniello Dellacroce, #772-3382, by arranging for an unauthorized visit by his minor daughter, Annette Dellacroce, and a friend, Rosemary Connelly, between September 5, 1972, and November 20, 1972, under pass #10643, and the said captain knowingly filing false documents to facilitate the said visits.

I now call your attention to November 15, 1972. Was the bug in operation on that date,

EXHIBIT "2" TO MOTION - TRANSCRIPT OF DEPARTMENTAL TRIAL

during the period 6:00 P.M. to 10:00 P.M. that evening?

A Yes, sir.

THE HEARING OFFICER: November 15th?

THE WITNESS: Yes, sir.

BY MR. ZWEIBEL:

Q Did you have occasion to subsequently listen to this tape?

A Yes, sir.

Q Did you identify the voice of Helen Pasqua, Frank Pasqua, and Richard Curio from that tape?

A Yes, sir.

MR. ZWEIBEL: For the purpose of the hearing, Mr. Muschio, I assume you would like to see a copy of the transcript. It is excerpted portions of the transcript.

THE HEARING OFFICER: Off the record.

(Discussion off the record.)

Q I will rephrase the question.

Did youhave occasion to listento the tape of November 15, 1972, the conversation taking place in Mr. Curio's home, between the hours of

EXHIBIT "2" TO MOTION - TRANSCRIPT OF DEPARTMENTAL TRIAL

of 6:00 and 10:00 P.M. that evening?

A Yes, sir.

Q Did you subsequently identify the voices of Helen Pasqua, Frank Pasqua, Richard Curio and Beatrice Curio?

A Yes, sir.

Q Will you tell us at this time what the sum and substance of that conversation was?

A At the November 15, 1972, time, during the meeting, Frank Pasqua was explaining to Richard Curio and Beatrice Curio about unauthorized visiting of his girl, Aniello Dellacroce, and he also stated he did favors for the visitors, Dellacroce's daughter and his girl friend and he further stated he had approached Dellacroce's girl friend at the holding area and told Dellacroce's girl friend, whose name is Rosemary, that when you get off the bus, make believe that this girl slipped and hurt her ankle, at which time I will be standing there and I will bring the two of you into this private room, at which time I will call the father and tell them about the foot of his daughter, Dellacroce, and this is what he was telling to Richard Curio.

EXHIBIT "2" TO MOTION - TRANSCRIPT OF DEPARTMENTAL TRIAL

Q Who is Aniello Dellacroce?

A Aniello Dellacroce is an inmate.

Q On that date, referring to November 15, 1972, to your knowledge was Aniello Dellacroce an inmate?

A Yes, sir.

Q Was this in one of the Riker's Island facilities of New York City Department of Correction?

A He was at the Riker's Island dorm 17.

Q Was he serving a sentence at that time?

A Yes, sir.

Q What was the crime for which he was sentenced?

A I believe it was criminal contempt.

Q Do you know how long his sentence was for?

A I believe for one year.

Q In the conversation previously described, that was taped, was it taped as a result of the bug previously described in operation at that time?

A Yes, sir.

Q I now call your attention to November 18, 1972, between the hours of 1:00 P.M. and 5:00 P.M., and was the same bug which you previously described

in operation?

A Yes, sir.

Q From the conversation taped, you subsequently identified the voice of Richard Curio, Helen Pasqua and Frank Pasqua?

A Yes, sir.

Q Will you tell us what the substance of that conversation was?

A Yes. Capt. Pasqua was explaining during that conversation how he was supposed to go up to the Bronx and collect five thousand dollars, pick up five thousand dollars for a parole officer by the name of Gene Squiteri, and that was the substance of that conversation.

THE HEARING OFFICER: He was a parole officer?

THE WITNESS: Yes, sir.

MR. ZWEIBEL: Off the record.

(Discussion off the record.)

BY MR. ZWEIBEL:

Q What was the five thousand dollars for, if you know?

A That was for the release of a Thomas Marino,

EXHIBIT "2" TO MOTION - TRANSCRIPT OF DEPARTMENTAL TRIAL

who was an inmate at Riker's Island at that time, who was serving a year for criminal contempt.

Q Did you have occasion to hear a further conversation that took place between the hours of 1:00 P.M., and 5:00 P.M. on that same date, November 13, 1972, this conversation concerning a case of scotch, which was received by Frank Pasqua for a favor?

A Yes, sir.

Q Will you tell us what the substance of that conversation was?

This is regarding specification No. 3.

A The substance of this conversation was that Capt. Pasqua received this case of scotch from a person by the name of Joseph Dante who in turn stated that he received the scotch from Dellacroce, I believe for favors that Cpt. Pasqua was giving to Dellacroce it was a case of scotch.

MR. ZWEIBEL: I have no further questions at this time, and I ask that we resume on a second date, which has already been selected for 2:00 P.M., March 28th, for the purpose of hearing pertinent parts of the case.

EXHIBIT "2" TO MOTION - TRANSCRIPT OF DEPARTMENTAL TRIAL

THE HEARING OFFICER: 2:00 o'clock, that is.

MR. MUSCHIO: Off the record.

(Discussion off the record.)

- - -

EXHIBIT "2" TO MOTION - TRANSCRIPT OF DEPARTMENTAL TRIAL

DEPARTMENT OF CORRECTION
CITY OF NEW YORK

- -x

In the Matter of the

Disciplinary Hearing of

FRANK PASQUA,

Respondent.

- -x

100 Centre Street
New York, New York
March 27, 1973
2:30 P.M.

B E F O R E :

HON. CHARLES J. KEMINS,

The Hearing Officer

ACME REPORTING SERVICE
SHORTHAND AND STENOTYPE REPORTERS
NOTARIES PUBLIC
140 NASSAU STREET
NEW YORK CITY
TELEPHONES: BEEKMAN 3-0664-0665-0666

EXHIBIT "2" TO MOTION - TRANSCRIPT OF DEPARTMENTAL TRIAL

Appearances:

RONALD ZWEIBEL, Director of Legal Affairs,
Department of Corrections

MUSCHIO, WEINGARD & BROUDNY, ESQS.,
Counsel for the Respondent
401 Broadway
New York, New York 10013.
BY: SAVERIO A. MUSCHIO, ESQ.

ANDREW P. DONLAVY, District Attorney of the Bronx

Also Present:

FRANK MUNARI, Detective, N.Y.P.D. Shield #695,
Department of Investigation

FRANK PASQUA, Respondent.

- - -

PROCEEDINGS

MR. ZWEIBEL: Mr. Muschio, the two tapes that we will be offering —

MR. DONLAVY: Three.

MR. ZWEIBEL: Three reels of tape that we will be offering into evidence today, concern two dates, November 15, 1972, and November 18, 1972. With regard to these three tapes — rather, will you stipulate at this time that the three tapes were duly and properly executed?

MR. MUSCHIO: What you propose to offer now are excerpts or segments of larger tapes,

Right?

Why don't we make a reference to these larger tapes by either some numeric or lettering of the tapes so we know exactly what portion of the tapes we are making --

MR. DONLAVY: We are offering the entire reel in evidence, but only the excerpted conversation. We are talking about the putting on and taking off --

MR. MUSCHIO: Such portions as designated.

Okay, we are going to stipulate as to the execution of the entire tape because this is a part of the tape. I understand that.

THE HEARING OFFICER: Put your stipulation on the record.

MR. MUSCHIO: Now, Andrew, is this just a pertinent portion?

MR. DONLAVY: Yes, these are.

MR. MUSCHIO: Where is the 15th? I have the 18th, but I don't have the 15th.

MR. DONLAVY: I have the 15th, also.

MR. ZWEIBEL: Off the record.

(Discussion off the record.)

EXHIBIT "2" TO MOTION - TRANSCRIPT OF DEPARTMENTAL TRIAL

MR. ZWEIBEL: On the record.

At this time, Mr. Muschio, will you stipulate as to prosecution of the tapes involved, that is, three tapes covering the dates, November 15, 1972 and November 18, 1972, as well as to continuity of possession of those tapes?

MR. MUSCHIO: Yes.

Excuse me, let's have it on the record by the District Attorney's office of Bronx County.

MR. DONIAVY: That is, to the custody of possession, that's right.

MR. ZWEIBEL: The witness is still under oath; is that correct, Commissioner Kemins?

THE HEARING OFFICER: Yes, he is.

F R A N K M U N A R I, called as a witness, having been previously duly sworn, was examined and testified further as follows:

EXAMINATION BY

MR. ZWEIBEL:

Q The first conversation that will be placed will be that of November 15, 1972.

Mr. Munari, at the last session, did you identify the voices on that tape as being the voices

EXHIBIT "2" TO MOTION - TRANSCRIPT OF DEPARTMENTAL TRIAL

of Richard Curro, Beatrice Curro, Helen Pasqua and Frank Pasqua?

A Yes.

Q And you also stated on the record what that conversation concerned; is that correct?

A Yes.

Q All right. At this time will youplease play that tape?

(Whereupon, a reel of tape was played.)

MR. DUNLAVY: You don't want her to take down the tape; do you?

THE HEARING OFFICER: No.

MR. DUNLAVY: The tape is in evidence, so you don't have to.

THE HEARING OFFICER: No.

(A real of tape was played.)

MR. MUSCHIO: Now, apparently, that is not just this portion here.

THE WITNESS: No, we are trying to get that portion.

THE HEARING OFFICER: Must you go through that whole thing to do that?

MR. DUNLAVY: No, we are very close to it.

MR. MUSCHIO: What I am suggesting to you is just to follow this so you know the onset of the conversation.

THE HEARING OFFICER: That's just what I have been looking for.

THE WITNESS: I have intentions of stopping it and saying this is this portion of the excerpts here.

THE HEARING OFFICER: We don't want to go through the whole thing.

THE WITNESS: No, we are not. We should be right on top of it. It is just that these are excerpts on the reel.

All right, that's the beginning (stopping tape recorder).

(Whereupon, the tape was played.)

THE WITNESS: That's the end of the excerpt.

MR. MUSCHIO: Wait a minute. What are you talking about?

THE HEARING OFFICER: The end of what excerpt? This one here?

MR. DUNLAVY: Yes, up to where the asterisks are.

MR. MUSCHIO: This other one is pertinent and the same date?

MR. DONLAVY: Yes.

THE HEARING OFFICER: Wait a while. Will you get this part back for me? Tell me when you start here.

THE WITNESS: That's it.

(Whereupon, the tape was played.)

THE HEARING OFFICER: It starts here.

MR. MUSCHIO: All right. That's it.

THE HEARING OFFICER: All right, I get it.

All right, now, do you want to go on to the other?

MR. MUSCHIO: Is there any chance we can get close to this other conversation without you having to --

THE WITNESS: Yes, we will be right there in a few minutes.

BY MR. ZWEIBEL:

Q What excerpt is this?

A This is your second excerpt from November 15, 1972.

Q And you previously identified the same

voices that you identified from the first tape?

A Yes.

Q At the prior hearing date, you testified as to what the sum and substance of the conversation on that tape was; is that correct?

A Yes.

Q Would you please play that second excerpt?

(Whereupon, Mr. Munari played the tape.)

THE HEARING OFFICER: Can you make the tone louder?

MR. MUSCHIO: No, I don't think so.

THE HEARING OFFICER: Just let me know when you hit it.

MR. DONLAVY: It is before that, Frank. All right, this is the beginning.

THE WITNESS: (Stopping tape.) This is the beginning of the second excerpt from November 15th, all right?

THE HEARING OFFICER: Go ahead.

(Whereupon, the witness played the tape.)

THE WITNESS: (Stopping tape.) That's the end of the second excerpt.

THE HEARING OFFICER: While you are getting

EXHIBIT "2" TO MOTION - TRANSCRIPT OF DEPARTMENTAL TRIAL

back into that, there are certain understandings and stipulations, as far as the voices involved. I think that came up at the last hearing; didn't it?

MR. DONLAVY: No.

MR. MUSCHIO: Oh, no, not at all. Absolutely not.

THE HEARING OFFICER: I understand. That's his testimony?

MR. MUSCHIO: That's his testimony. We haven't gotten to cross-examination yet.

By the way, you know I have never been supplied with a copy of that transcript, investigation -- oh, yes, I have.

THE HEARING OFFICER: I want that, too.

MR. DONLAVY: That was put in evidence; wasn't it?

MR. ZWEIBEL: Was it put in evidence, the transcript?

THE WITNESS: Oh, yes, this transcript (indicating), that was put in.

THE HEARING OFFICER: Because that is what I will want, too.

MR. ZWEIBEL: We will be provided with a copy of these proceedings, will we not?

THE HEARING OFFICER: I don't see why not.

MR. ZWEIBEL: Off the record.

(Discussion off the record.)

THE HEARING OFFICER: On the record.

All right. Proceed.

We are on the 18th?

THE WITNESS: Yes, we are on the 18th.

BY MR. ZWEIBEL:

Q The tape that we will be playing at this time concerns the date November 19, 1972.

Det. Munari, on the date of the hearing, prior to today, did you identify the voices on that first conversation as being that of Richard Curro, Beatrice Curro, Helen Pasqua and Frank Pasqua?

A Yes.

Q Did you also state the sum and substance of what that conversation dealt with on the tape?

A Yes, I did.

Q Would you now play that tape?

(Whereupon, the witness played the tape.)

THE WITNESS: I am going to have to go

BEST COPY AVAILABLE

back on this thing here.

MR. DONLAVY: No, I don't think so.

MR. MUSCHIO: I don't think you arrived there yet. There is some conversation that is similar.

Wait a minute. We are lost here. You skipped. That's the second part of the conversation. That's the conversation down here -- Off the record.

(Discussion off the record.)

MR. MUSCHIO: On the record.

Could we go beyond it, because this conversation is verbatim, what we heard before.

MR. DONLAVY: Yes, but that's on the other reel. It is not even close.

MR. MUSCHIO: You mean we have another reel to play?

MR. DONLAVY: Yes.

THE WITNESS: We are right on it now; just let me go back and get it.

It is right here (stopping tape).

MR. MUSCHIO: That is it. Here we are, go back just a little.

THE HEARING OFFICER: Where is that?

THE WITNESS: Right here (indicating).

MR. MUSCHIO: All right. I told you that is it.

THE HEARING OFFICER: All right.

(Whereupon, the witness played the tapes.)

MR. DONLAVY: That's it, Frank.

MR. MUSCHIO: No, no. There is some more.

MR. DONLAVY: No, he has on the second conversation.

MR. MUSCHIO: Oh, I see. All right. The big difficulty is locating it.

MR. DONLAVY: Go to C now, D, and then C. That's right.

THE WITNESS: You want me to go to which one now?

You want to go to B; right?

MR. DONLAVY: Was that A?

Yes, that's right.

MR. MUSCHIO: Maybe we will get lucky this time.

THE WITNESS: I hope so.

Are we all set, Gentlemen?

EXHIBIT "2" TO MOTION - TRANSCRIPT OF DEPARTMENTAL TRIAL

MR. DONLAVY: No, wait a minute. You are in the middle of the wrong conversation.

THE WITNESS: Hold it. Wait a minute. It has to be B, right?

THE HEARING OFFICER: You might do me a favor, when you get there, you will get there sooner than I will, so let me know.

MR. MUSCHIO: We already had part of the conversation.

MR. DONLAVY: We are up to C, aren't we?

THE WITNESS: No. C comes right after B.

MR. MUSCHIO: We didn't even get to B, yet.

MR. DONLAVY: Here it is -- no, it is not.

THE WITNESS: All right, why don't we handle this?

MR. DONLAVY: Yes, what happened to B, though, Frank?

That's 685, we can always get that, but look where B is; we are way past it.

MR. ZWEIBEL: Didn't you do it by numbers?

THE WITNESS: No, because of the fact that we might not have had this recorder, and there are all different speeds. They might not

match up.

MR. MUSCHIO: I can't stand that guy's voice.

Should be this now.

MR. DONLAVY: It is coming up.

MR. MUSCHIO: All right, that's it.

(Whereupon, the witness stopped the tape.)

MR. DONLAVY: That's it.

That's it. The next one is on 680. Go to 680. Okay, that starts the next conversation.

THE WITNESS: Are you ready?

MR. MUSCHIO: Right.

(Whereupon, the witness played the tape.)

MR. MUSCHIO: Okay.

(Whereupon, the witness stopped the tape.)

MR. DONLAVY: That's it, Frank.

The last one is on the next reel.

MR. MUSCHIO: Andrew, you are letting me have this (indicating), did you say?

MR. DONLAVY: Yes.

MR. MUSCHIO: Thank you.

MR. DONLAVY: Are you sure you didn't pass it?

THE WITNESS: I don't think so.

EXHIBIT "2" TO MOTION - TRANSCRIPT OF DEPARTMENTAL TRIAL

No, I don't think I [illegible] it.

MR. DONLAVY: Okay.

THE WITNESS: (Stopping tape.) That's it, right?

MR. DONLAVY: Yes, this is it.

(Whereupon, the witness played the tape.)

MR. DONLAVY: Okay, that's it, Frank. Knock it off.

(Whereupon, the witness stopped the tape.)

MR. MUSCHIO: May I --

MR. DONLAVY: One second, Sav.

MR. MUSCHIO: Okay.

MR. ZWEIBEL: Let me put one further thing on the record.

BY MR. ZWEIBEL:

Q Det. Munari, did you have occasion, prior to listening to this tape, to have conversation with all of the parties on that tape, to wit: Richard Curro, Beatrice Curro, Helen Pasqua and Frank Pasqua?

A Yes.

Q Were you able to identify their voices on the tape from these past conversations that you had with them?

A Yes.

Q Now, these prior conversations, were either conversations that you had with the parties concerned on the tape or conversations that you have heard in your presence?

In other words, conversations that they have had in your presence; is that correct?

A Yes.

Q One additional thing: On the last occasion that you testified, you told us what was contained on the tapes with regard to the deal concerning the case of scotch, is that correct?

A Yes.

Q And you stated that that conversation took place when? Do you recall?

A The 18th of November.

Q Did that conversation take place at any other date?

A Yes, on the 15th of November, also. It was two discussions.

Q Is that part of the tape we heard today?

A Yes.

MR. ZWEIBEL: Is there anything that you

EXHIBIT "2" TO MOTION - TRANSCRIPT OF DEPARTMENTAL TRIAL

wish to state at this time?

MR. MUSCHIO: Yes, I would, very briefly.

THE WITNESS: I just thought of something -- one moment.

MR. MUSCHIO: Okay.

THE HEARING OFFICER: Go ahead.

EXAMINATION BY

MR. MUSCHIO:

Q Mr. Munari, you say that a bug or listening device was operated out of the home of Richard Curro, and operated off the current in the apartment; is that correct?

A Yes.

Q Is this an apartment or one-family dwelling?

A One-family private housing.

Q Were you personally involved in the installation of that bug?

A No, sir.

Q Were you there when it was installed?

A No, sir.

Q Do you know it was installed or was it told to you?

A I know it was installed.

Q How do you know? I want to find out.

A I am also one of the tech men at the Department of Investigation who handles electronic equipment at the Department of Investigation. It was my suggestion --

MR. MUSCHIO: I move the answer be stricken. I asked him a direct question: Whether or not he was present at the time of installation.

He answered to that question, "No."

THE HEARING OFFICER: All right. Go on from there.

Q I assume, then, your knowledge is based upon what someone told you?

A Yes.

Q You have no personal knowledge, other than what you were told?

A That is correct.

Q For all you know, personally -- by the way, where were these premises located?

A 2566 Morgan Avenue.

Q Now, for all you know, from your own personal knowledge, this bug may have been placed in an adjacent premises or some other premises in that vicinity; isn't that correct?

A I would have to say no.

Q Well, you just told us that you don't have any personal knowledge of that installation of that bugging device at 2566 Morgan Avenue?

A Correct.

Q Other than what was told you, I assume youhad something to do or prepared the electronic equipment employed; is that correct?

A Yes.

Q Now, at the end of this transmitter, was there a receiving apparatus that was transmitted, relayed, and received over this, is that correct?

A Yes.

Q You weren't present at the time this was being transmitted or received; were you?

A No, not on these particular conversations.

Q On any of these conversations?

A No.

Q There again, sir, you don't have any knowledge, apart from what you listened to over those tapes?

A Yes.

MR. ZWEIBEL: Mr. Muschio --

EXHIBIT "2" TO MOTION - TRANSCRIPT OF DEPARTMENTAL TRIAL

Off the record.

(Discussion off the record.)

THE HEARING OFFICER: Go ahead.

BY MR. MUSCHIO:

Q You didn't see any of these people enter the premises who were involved in this conversation, is that correct.

A No, sir.

Q Now, sir, did you ever have telephonic communication with the respondent, Frank Pasqua? Did you ever speak with him over the telephone?

A Yes, I listened in on a conversation.

Q When was that?

MR. ZWEIBEL: Objection.

MR. MUSCHIO: I think it is relevant in determining whether or not he can identify a voice.

THE HEARING OFFICER: Go ahead.

MR. MUSCHIO: There was an objection made.

THE HEARING OFFICER: I didn't hear any objection.

MR. ZWEIBEL: I object, at this particular time, because the conversation that Mr. Muschio

is seeking to find out is a conversation that is confidential and not related to this particular hearing. It is important that that conversation be kept confidential, with respect to Mr. Pasqua's voice. The identification can be made from other sources.

THE HEARING OFFICER: I am going to overrule the objection at this time.

Proceed. Let's see where he goes.

MR. MUSCHIO: For the purpose of the record, I am not — I don't even know of any conversations.

BY MR. MUSCHIO:

Q You say you had a conversation in which one of the voices was that of the respondent; is that correct?

A Yes.

Q When was that?

A It was on a Sunday night.

Q What date? How close to the 15th or the 16th of November? See if you can find something to refresh your recollection.

A (Witness looking) It could have been November 26th,

or December 3rd, I can't --

THE HEARING OFFICER: That is enough of an answer.

MR. MUSCHIO: I beg your pardon?

THE HEARING OFFICER: I said that is enough of an answer.

BY MR. MUSCHIO:

Q November 26th or December 3rd; is that right; is that what you are saying?

A Yes.

Q Now, you used a memorandum to refresh your recollection, with respect to either of those two dates; right?

A No.

Q Did that memorandum, or whatever it was that you looked at, did that serve to refresh your recollection?

A Yes, from the events of it that occurred.

Q Was the call made to the respondent's residence?

MR. ZWEIBEL: Objection.

Q Where was this call made to?

MR. ZWEIBEL: Objection, your Honor,

ine the question is whether he
entify a voice on a conversation,
the call.

EARING OFFICER: I agree with him.

. MUSCHIO: I take exception to your
ing.

Q Was that the only time you heard the respondent's voice on the telephone?

A Yes.

Q Was it on the respondent's telephone or someone else?

MR. ZWEIBEL: Objection.

THE HEARING OFFICER: Objection sustained.

MR. MUSCHIO: I am trying to ascertain now whether or not there exists grounds now for keeping any of this information out of the record on the theory that it may have been in violation of the right of this defendant, and this being an administrative hearing, and I don't believe I need go into the authority on that, but if you insist on that, I will put some of the -- I am thinking in the matter of application, Rio Grande versus State Liquor Authority, as

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well as Madma Fine versus State Liquor Authority, reported in 24 New York Section, Court of Appeals.

THE HEARING OFFICER: Off the record.

(Discussion off the record.)

THE HEARING OFFICER: On the record.

At this time, I am not ready to agree or disagree with him.

MR. MUSCHIO: You are sustaining the objection?

THE HEARING OFFICER: Right.

MR. MUSCHIO: You won't permit me to find out whether it was a private telephone wire of this respondent?

BY MR. MUSCHIO:

Q Was this a private telephone that you listened to his conversation on?

MR. ZWEIBEL: Objection.

THE HEARING OFFICER: Objection sustained.

Q How long did you listen in to this voice?

A I would have to say about three minutes.

THE HEARING OFFICER: How many?

THE WITNESS: Three minutes.

EXHIBIT "2" TO MOTION - TRANSCRIPT OF DEPARTMENTAL TRIAL

THE HEARING OFFICER: How many?

THE WITNESS: Three minutes.

Q Now --

MR. ZWEIBEL: Mr. Muschio, if you are going to go on too much longer, which I think you will, I will need another break. We are starting a meeting in five minutes.

MR. MUSCHIO: Off the record.

(Discussion off the record.)

(Whereupon, the hearing was recessed for five minutes.)

BY MR. MUSCHIO:

Q Now, Mr. Munari, I take it then there has been but a single instance where you were listening to the voice of the respondent on the telephone, is that correct?

A Yes, sir.

Q You can't say if it was on November 26th or December 3rd?

A Yes.

Q You made no notes whatever of the conversation, Mr. Munari?

A No, you wouldn't be correct.

Q Do you have notes about this conversation?

A Yes, I believe I do.

Q Do you have them with you?

A Yes, I believe I do.

Q May I see them, please?

(Whereupon, the witness gets his notes.)

THE HEARING OFFICER: You have to show them to your counsel, first.

THE WITNESS: Let me find them.

(Witness passes his notes to his counsel.)

MR. ZWEIBEL: Off the record.

(Discussion off the record.)

MR. ZWEIBEL: Let me state on the record, at this time, I object to any notes regarding this conversation coming into evidence, since this is not the basis upon which Det. Munari identified Mr. Pasqua's voice, with regard to the transcripts.

MR. MUSCHIO: Are you prepared now to stipulate now that the identity of the respondent's voice is in no way determined either partly or in toto by reason of Mr. Munari overhearing this telephone conversation of his voice?

MR. ZWEIBEL: That is correct.

MR. DONIAVY: That is correct.

THE HEARING OFFICER: In that event, the objection, of course, is sustained.

MR. MUSCHIO: I will take exception to it.

THE CHAIRMAN: And, furthermore, the remark you made too, to the effect, and what they conceded, seems to cover that question.

MR. MUSCHIO: Fine, but now, sir, I may have wanted -- there is a notation as to a date on there. It may be relevant to his credibility of this conversation, and thereby, you have a right to consider that with any other testimony he may have testified to.

BY MR. MUSCHIO:

Q Does it have a date on there?

A Yes, it does.

Q May we have that date?

A November 26th.

Q Again, we are agreeing that that in no wise affected your judgment as to --

I will withdraw the question.

Your identification of the respondent's

voice is in no way determined either partly or totally by that conversation, is that correct?

A No, sir, it wasn't.

Q Did you have conversation with this respondent in person on any occasion?

A Yes, sir.

Q When was that?

A February 2nd, February 5th, February 7th, I had a conversation --

Q Where did they take place?

A Well, two conversations took place at Mr. Pasqua's residence, and three conversations had taken place with Mr. Pasqua at the Department of Investigation.

Q All right, now, sir, when you had these conversations, was it purposely and specifically determined to whether you can make a voice identification with this respondent, as against what you heard in the tape?

A That was part of it, yes. There was also other parts, too.

Q Most of it was concerned with the investigation, was it not?

A Most of it was concerned with the investigation.

Q Did you say you are familiar with electronic device bugging?

A Yes.

Q Did you ever listen on a recording of a wire intercept as well?

A On a hard wire, no.

Q How many instances have you been involved with directly or indirectly, with bugging type apparatus?

A Five days a week. Monday to Friday, I would have occasion on every day to handle one or two wire jobs, each day; maybe, three.

Q Has it been your experience that a voice over a wire sounds distinctly and quite different than a voice in person, even though it is the same individual?

A My experience has beenthat I can identify the voice if I listen to the electronic equipment and the individual's voice.

Q Did you do that simultaneously or close on the heels of the defendant, respondent, in person?

A What do you mean?

EXHIBIT "2" TO MOTION - TRANSCRIPT OF DEPARTMENTAL TRIA

Q Did you listen to the tapes close, in point of time to those conversations, with the purpose of identifying the respondent?

A What length of time?

Q On February 2nd, when was the last time you heard the tape played prior to that date?

A I would have to say —

May I look at a calendar?

(Whereupon, the witness looked at a calendar.)

A I would have to say the week of December 18, 1972.

Q Particularly, six weeks prior to any conversation; is that right?

A Yes, sir.

Q That's the last time you listened to any tape recording, which purported to be that of Frank Pasqua, prior to any conversations you had with him; is that correct?

A It was about six weeks.

Q Prior to any conversations that you had in person with the respondent, isn't that right?

A Yes, I would have to say so.

MR. MUSCHIO: I have no further questions.

MR. ZWEIBEL: I have no further questions.

MR. MUSCHIO: That's all. I have no further questions.

THE HEARING OFFICER: All right. Any more witnesses?

MR. DONLAVY: No.

THE HEARING OFFICER: The Department rests?

MR. ZWEIBEL: Just one second.

(Whereupon, Mr. Zweibel consulted with Mr. Donlavy.)

MR. ZWEIBEL: The Department rests.

MR. MUSCHIO: The respondent rests.

THE HEARING OFFICER: Did the Department rest?

MR. ZWEIBEL: The Department rests.

THE HEARING OFFICER: All right, do you want to make any motions at this time?

MR. MUSCHIO: At this time, I move to dismiss all the specifications contained against the respondent on the ground that the Department failed to prove its case, with respect to any or all of the specifications.

THE HEARING OFFICER: Well, decision is

reserved on that.

Do you also want to make a closing statement?

MR. MUSCHIO: Yes, I do. I would like to say, whatever the finding of this Department is with respect to any of the violations contained in the specifications, that you consider any punishment that may be meted out against this respondent and take into consideration, raises, long years of service and employment with the Department of Correction, and that he is now past the time when he would be eligible for his pension, and that any disciplinary action taken, untaken or contempt made, should in my mind, be consonant with that record, and the extreme disciplinary action, namely, the dismissal of this respondent, and thereby affecting his right of pension, I believe, is not warranted by the proof in this case.

I think that you will find, when you study the case or the transcript, you will find that the thread, throughout these conversations, would indicate that this respondent was in no

wise involved in any payoffs of any kind. Nor was he an instrument, either directly or indirectly in affecting the release on parole of the persons mentioned herein, and that at best, if at all, his involvement, by his own statements on those cases, if indeed, you believe that to be his voice, based upon the record, indicates that he only received a case of scotch on an occasion, perhaps, for some favor he had done, and that doesn't appear too clear.

I submit that the disciplinary action here by cessation of employment, thereby depriving him of his pension, would be, in my judgment, very cruel and harsh disciplinary action taken against this respondent.

I would ask you, in your overall judgment, that you take this into your consideration and you deem it advisable to inflict some sort of punishment that would not be as harsh.

MR. ZWEIBEL: The only thing alleged that Capt. Pasqua had done wrong was to have accepted a case of scotch is wrong.

I also call to your attention the fact that

it was charged and shown at this hearing that Mr. Pasqua did offer to service an intermediary in a bribe scheme, whereby a sum of five thousand dollars was to be obtained by Capt. Pasqua for the purpose of the release of an inmate, Thomas Marino.

The fact that this deal didn't ultimately go through, doesn't mean that there wasn't serious violation with regard to the rules and regulations of this charge.

Second, there was an unauthorized visit, whereby Mr. Pasqua had arranged for an inmate, Aniello Dellacroce, to see his daughter and his friend in an unauthorized manner.

Third of all, one of the most serious charges was the fact that he was directed to appear before the Department of Investigation on February 7, 1973, and when questioned with regard to his official duties, he refused to testify.

That's all I wish to say.

MR. MUSCHIO: I would like to add this: I neglected to state the fact that the

evidence tended to establish the fact that there might be some violation of rule in the visits; that's for you to determine, but so far as the proceedings, I think the transcript speaks for itself.

The reasons why are specifically set forth on the record, and I don't believe it was a blanket refusal to testify. I think it is circumscribed by the events and testimony and statements that he was summoned, too.

So far as the testimony on the tapes, indicating that he agreed to serve as an intermediary, I think it is a fact that if all the tapes were played, that would not be the situation. I think it is my judgment that the D.A.'s office is reasonably satisfied that that was not the case. It is a misunderstanding. I don't believe even from listening to these tapes that that was the case.

I think some of the statements and answers made by the respondent are in a question form. For example, pointing out one relating to the conversation on November 15th (indicating),

where Pasqua is allegedly saying, "I am on the payroll?" which is a question to somebody making that accusation, and I think you will note that is surprise to an alleged payoff or intermediary. It never came about, and it was relating to a manner in which they base a payoff, so that couldn't be the case.

THE HEARING OFFICER: All right, decision reserved.

(Whereupon, at 4:15 P.M., the hearing was concluded.)

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EXHIBIT "3" TO MOTION - STATE COURT PETITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

- -X

In the Matter of the Application of :

FRANK PASQUA, :

Petitioner, :

-against- : NOTICE OF PETITION

NEW YORK CITY DEPARTMENT OF CORRECTION and BENJAMIN J. MALCOLM, as COMMISSIONER of NEW YORK CITY DEPARTMENT OF CORRECTION, :

Respondents. :

For Relief Pursuant to Article 78, CPLR. :

- -X

S I R S:

PLEASE TAKE NOTICE, that upon the annexed verified petition of FRANK PASQUA, verified the 17th day of July, 1973, and the attached exhibits, an application will be made to this Court at a Special Term, Part I thereof, to be held in and for the County of New York, at the County Courthouse, 60 Centre Street, Borough of Manhattan, City and State of New York, on the 31st day of July, 1973, at 9:30 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for a judgment granting the relief demanded in the attached petition, and for such other and further relief, as may be just and proper in the premises.

PLEASE TAKE FURTHER NOTICE, that a verified answer, and supporting affidavits, if any, must be served upon the undersigned at least five (5) days before the return date of this application, and that pursuant to Sec. 7804 of the CPLR, you are directed to file with the Clerk of the Court, your

answer and answering affidavits, etc., together with a certifi transcript of the record of the proceedings to be considered herein.

Dated: New York, New York
July 17 , 1973

Yours etc.

BIAGGI, EHRLICH, GALIBER & LANG
Attorneys for Petitioner
Office & P. O. Address
299 Broadway
New York, New York 10007
(212) 233 - 1177

EXHIBIT "3" TO MOTION - STATE COURT PETITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

- X

In the Matter of the Application of :

FRANK PASQUA, :

Petitioner, :

-against- : PETITION

NEW YORK CITY DEPARTMENT OF CORRECTION and BENJAMIN J. MALCOLM, as COMMISSIONER of NEW YORK CITY DEPARTMENT OF CORRECTION, :

Respondents. :

For Relief Pursuant to Article 78, CPLR. :

- X

TO THE SUPREME COURT OF THE STATE OF NEW YORK:

The petitioner respectfully alleges as follows:

FIRST: At all times hereinafter mentioned, the petitioner was and still is a resident of the State of New York.

SECOND: At all times hereinafter mentioned, the respondent, NEW YORK CITY DEPARTMENT OF CORRECTION, was and still is a department organized and existing under the applicable laws of the City and State of New York; and at all times hereinafter mentioned, the respondent, BENJAMIN J. MALCOLM, was and still is the Commissioner of The Department of Corrections of The City of New York.

THIRD: That heretofore and prior to the acts hereinafter complained of, the petitioner was employed as a Correction Captain with the New York City Department of Correction. That prior to the events complained of herein, the petitioner was a Correction Captain in good standing and performed his duties in

EXHIBIT "3" TO MOTION - STATE COURT PETITION

in accordance with the law.

FOURTH: The respondent made the determination complained of, and the material events herein alleged took place, within the State of New York and four months have not elapsed since the final determination complained of by the petitioner in this proceeding.

FIFTH: On or about February 8, 1973, petitioner was served with charges and specifications alleging misconduct, thereafter brought to trial on March 15, 1973. The charges essentially alleged misconduct charging the Captain with serving as an intermediary in a bribery scheme; with providing favored treatment to an inmate and refusing to testify before the Department of Investigation.

SIXTH: Petitioner is 54 years of age and has been in service with the New York City Department of Correction approximately 22 years with an unblemished record.

SEVENTH: On March 15, 1973, a Disciplinary Hearing was held by the New York City Department of Correction and a copy of the specifications are annexed hereto. The department called Detective Frank Munari who was assigned to the City Department of Investigation. His essential testimony was that he served a subpoena on Captain Pasqua and that on February 7, 1973, Captain Pasqua appeared before the Department of Investigation and stated that he would not answer any questions. This testimony essentially relates to specification No. 4 and will be more fully dealt with subsequently.

Detective Munari further testified in response to a question that a "bug" was installed in the home of another

correction officer. There was no testimony as to whether or not this "bug" was installed legally and pursuant to a Judicial Order.

EIGHTH: The witness, Munari, now testified which is mentioned on page 14, of the transcript, that the petitioner did provide favor treatment to an inmate by an unauthorized visit by his minor daughter and a friend. The only testimony as to this, was so-called taped conversations recorded on this so-called "bug" which the witness, Munari, stated contained statements by the petitioner explaining to other people about the so-called unauthorized visit to the inmate. There is no further evidence at the Departmental Hearing as to this specification, which is specification No. 2.

NINTH: The witness was then questioned and testified again about a so-called conversation picked up by the "bug" that the petitioner was supposed to collect $5,000 for a parol officer for the purpose of securing the conditional release of an inmate. There is no further testimony and petitioner respectfully alleges to this Court that no such act ever took place and there is no evidence or testimony that any $5,000 was paid nor was there any evidence or testimony that the inmate received a conditional release. The Court's attention is respectfully called to the fact that your petitioner would not have any relationship nor the power to secure the conditional release of the inmate. The only testimony against petitioner is the so-called questionable "bug" and even this only contains conversation questionable at best with no evidence or testimony indicating any wrong doing.

TENTH: The subsequent testimony of Detective Munari related to specification No. 3, page 19, of the transcript. This states that your petitioner received a case of scotch from a per-

son by the name of Dante who supposedly received the scotch fro the inmate who had received the unauthorized visit. There is n further testimony nor proof to substantiate the conversation fr the "bug" and this was the sole proof offered as to these charg

ELEVENTH: The only witness to appear for the Departme of Correction was Detective Munari. It is interesting that Detective Munari testified on pages 37 and 38, that he was not present when any of the so-called conversations was being transmitted or received when he was asked:

> "Question: There again, sir, you don't have any knowledge, apart from what you listened to over those tapes?
>
> Answer: Yes."

Thus, the witness who was the sole witness for the department, Detective Munari, had no personal knowledge about the "bug" and testified on page 39, that he had no personal knowledge and didn't see the people involved in this conversation and he testified as follows:

> "Question: You didn't see any of these people enter the premises who were involved in this conversation, is that correct?
>
> Answer: No, sir."

TWELFTH: On Page 47, of the transcript, it is also noted that Detective Munari met with the petitioner in February, of 1973, for the sole purpose of determining whether he could make a voice identification of the petitioner against the tapes that had been taken at another officer's home where the "bug" had been installed.

EXHIBIT "3" TO MOTION - STATE COURT PETITION

THIRTEENTH: On or about March 15, 1973, petitioner was present at a hearing, duly held before the respondent at which the petitioner was represented by counsel; a transcript of that hearing was taken and should be furnished to this Court as part of the return to be filed by the respondent with their answer in defense on the return date of this proceeding.

FOURTEENTH: On or about April 30, 1973, petitioner's counsel received the respondents' decision on the hearing which had been held on March 15, 1973. The decision found the petitioner guilty of the charges and imposed a penalty of dismissal from the service effective April 16, 1973. A copy of said decision is annexed hereto and marked Exhibit "A".

FIFTEENTH: The respondents, in imposing the maximum punishment of dismissal of service upon the petitioner, abused their discretion as to the measure or mode of penalty or discipline to be imposed, there was no reasonable nor plausible basis for said determination by the respondent and it was grossly disproportionate to the petitioner's offense.

SIXTEENTH: The sole basis for inflicting the punishment hereinabove referred to was the alleged wire tape evidence with no corroboration whatsoever and the refusal to testify before the Department of Investigation. Both these points will be dealt with at length on the return date and petitioner's briefs.

SEVENTEENTH: It is respectfully submitted to this Court that the basis for imposing the penalty of dismissal is disproportionate to the offense and constitutes a violation of the petitioner's Constitutional rights.Furthermore the findings are not based upon substantial, credible or audible evidence.

EXHIBIT "3" TO MOTION - STATE COURT PETITION

WHEREFORE, it is respectfully requested that the following relief be granted:

(a) That the respondents perform the duties enjoined upon them by law;

(b) That the penalty of dismissal herein be set aside and that the punishment inflicted be reduced to a punishment not in consistent with the specifications in the complaint, or in the alternative, that the respondents be ordered to remand this matter to the Trial Board Hearing Referee for such a determination other than dismissal from the New York City Department of Correction;

(c) That the respondents be ordered to restore the petitioner to duty on the ground that the determination dismissing him was against the weight of the evidence, had no foundation in fact and was not based on any grounds or weight of evidence requesting dismissal, and that the respondents be ordered to take such administrative action as is necessary to restore any other benefits or emoluments due to petitioner retroactive from April 16, 1973.

/s/

FRANK PASQUA

Dated: New York, New York
July 17, 1973

EXHIBIT "4" TO MOTION - PLAINTIFF'S STATE COURT BRIEF

To be argued by
BURTON C. AGATA

INDEX No. 13542/1973

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New York Supreme Court

Appellate Division—First Department

IN THE MATTER OF THE APPLICATION

of

FRANK PASQUA,

Petitioner,

against

NEW YORK CITY DEPARTMENT OF CORRECTION and BENJAMIN J. MALCOLM, as Commissioner of New York City Department of Correction,

Respondents.

PETITIONER'S BRIEF

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QUESTIONS PRESENTED

1. Whether Petitioner was unlawfully discharged for refusing to answer questions posed by the City Commissioner of Investigation in reliance upon his privilege against self-incrimination because under State law, the Commissioner lacked power to confer immunity.

2. Whether the New York statutory scheme for conferring immunity is void-for-vagueness and violates the due process clauses of the federal and state constitution if it permits discharge of the petitioner for refusing to answer questions asked by the City Commissioner of Investigation on grounds of self-incrimination.

3. Whether Respondent's determination was, on the entire record, not supported by substantial evidence.

4. Whether the penalty imposed against the petitioner was so excessively harsh and grossly disproportionate to the alleged offense as to constitute an abuse of Respondent's discretion.

5. Whether evidence in support of specifications two and three was based upon unlawful eavesdropping.

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PRELIMINARY STATEMENT

This is an Article 78 proceeding seeking review of dismissal and reinstatement of petitioner, commenced on July 19, 1973, in the Supreme Court, New York County. The proceeding was transferred to the Appellate Division on August 27, 1973 (Hon. Vincent A. Lupiano).

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FACTS

Captain Frank Pasqua, the petitioner, was employed by the New York City Department of Correction for more than twenty-two years. (R 8). The respondent Commissioner of Correction dismissed him from this position effective April 16, 1973, with the resultant loss of the retirement benefits he had accumulated over the years of honorable service.

On February 8, 1973, Captain Pasqua had been charged by the Commissioner with misconduct. According to the four specifications of the charge, the conduct purportedly consisted of serving as an intermediary in a bribery scheme; providing favored treatment to an inmate for which he allegedly received a case of scotch from another; and refusing to testify, concerning his official duties, before the New York City Department of Investigation (R 19).

A hearing in connection with this charge was held at the Department of Correction on March 15, 1973. The evidence at this hearing was so sparse and tenuous as to be virtually no evidence at all. The first and only witness against petitioner was Detective Frank Munari of the New York City Department of Investigation (R 26). He stated that on February 7, 1973, the day before the charges were filed, at a hearing before a Deputy Commissioner

of the Department of Investigation, Captain Pasqua declined to answer certain questions which were put to him (R 28-33)as charged in the fourth specification.

The remainder of Detective Munari's testimony related to specifications one, two, and three. (It may be noted that the first and what would seem to be the most serious of the remaining three specifications, involving bribery, was properly dismissed after the hearing despite the testimony of this witness). Munari stated that on February 14, 1972, a bug was installed in the Bronx home of Correction Officer Richard Curio (R 33-34), and that it was in operation on the next evening, February 15 (R 34-35).

Munari had subsequently listened to tapes of conversations held on November 15 and November 18, 1972, and had identified the voices of Helen Pasqua, Frank Pasqua, Richard Curio and Beatrice Curio (R 35). He did not have any personal knowledge, however, of who installed the listening device at Curio's home, and was not himself involved in the installation, and, indeed, was not present when it was installed (R 57). Furthermore, he was not present at the times when any of the conversations in question were being transmitted or received (R 59) and at no time saw any of those purportedly involved

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in the conversations enter Curio's home or inside the premises (R 60).

Munari next turned to his identification of the petitioner's voice on the tape, which he assertedly made as a result of three conversations with Pasqua during the first week in February, 1973 (R 68). These conversations took place about six weeks after the time Munari had last listened to conversations on the tapes (R 70).

It was on this basis - with no knowledge surrounding the events when the tapes were made and a highly questionable voice identification - that the witness purported to describe the substance of the recorded conversations (R 35-40). The transcripts of the tapes, which are of course the best evidence, were placed in evidence during the course of the hearing. The conversations contain references to a supposed unauthorized visit (R 100-101) and to a case of scotch (R 105, 107); but apart from Munari's interpretation of the conversations, based on the suspect voice identification, there is no other evidence in the record which indicates that Captain Pasqua was present during the conversations and made any of the statements on the tapes, or that the events charged in specifications two and three ever actually occurred.

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POINT I. PETITIONER WAS UNLAWFULLY DISCHARGED FOR REFUSING TO ANSWER QUESTIONS POSED BY THE CITY COMMISSIONER OF INVESTIGATION IN RELIANCE UPON HIS PRIVILEGE AGAINST SELF-INCRIMINATION BECAUSE UNDER STATE LAW, THE COMMISSIONER LACKED POWER TO CONFER IMMUNITY.

Petitioner herein has suffered loss of employment because of his refusal to testify before the City Commission of Investigation [See specification 4 and the finding and recommendation, R.112]* It is clear that unless he has been granted immunity from criminal prosecution,**he may not be compelled to testify nor may he be discharged for insisting upon such immunity. Cardner v. Broderick 392 U.S. 273 (1968). Of course, if, in fact, he had been coerced into testifying, the coerced statement, like any other coerced confession or admission, could not be used against him. Garrity v. New Jersey, 385 U.S. 493 (1967). However, whether there is coercion would be a question of fact in a particular case, for Garrity does not lay down a per se rule of coercion. (People v. Glucksman, 35 N.Y.2d 341). In any event, petitioner was not coerced; he resisted coercion, and, hence, Garrity has no bearing on this case.

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*For record of proceeding before City Commission of Investigation, see R.78-94, in which petitioner asserts his Fifth Amendment privilege and fact Commission has no power to confer immunity.

** Whether "use" or "transactional" immunity is granted is not material at this point.

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Petitioner insisted that immunity be conferred by one who is authorized to do so in compliance with the procedures established by the laws of this state. In insisting upon this right, petitioner relied and continues to rely upon the rights granted him by the explicit and clear language of Article 50 of the Criminal Procedure Law. It is petitioner's position that, in this case, there was a failure to comply with the laws of the State of New York in seeking to confer immunity on him and, hence, under state law, it was unlawful to discharge him for his refusal to answer questions posed by the City Commissioner of Investigation.

Subdivision 1 of Section 50.20 of the Criminal Procedure Law explicitly provides that a person who asserts his privilege against self-incrimination in a legal proceeding such as the one Pasqua faced "may not, except as provided in subdivision two, be compelled" to testify. Subdivision two provides, inter alia, that "competent authority" may confer immunity as defined in the statute* and thereby compel testimony. However, in order for such authority to be "competent",

*CPL § 50.10, subd. 1, defines "immunity":
1. "Immunity." A person who has been a witness in a legal proceeding, and who cannot, except as otherwise provided in this subdivision, be convicted of any offense or subjected to any penalty or forfeiture for or on account of any transaction,

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"[t]he proceeding [must be] one in which, by express provision of statute, a person conducting or connected therewith is declared a competent authority to confer immunity upon witnesses therein." CPL § 50.20, subd. 2(a).

There is no "express provision of statute" declaring the City Commissioner of Investigation or anyone acting on his behalf to be competent authority to confer immunity upon witnesses". Article 34 of the City Charter establishes the Commission and section 805 of the Charter sets forth the powers of the Commission when conducting an investigation. Unlike the powers granted the State Commissioner of Investigation by McK. Unconsol. Laws § 7507,* Charter § 805 contains no "express provision" conferring such powers on the City Commissioner.

Article 50, 50, CPL, expressly states that there was no obligation upon Pasqua to testify or respond to the Commissioner unless there was compliance with the laws of this state. Arguments

(cont)

matter or thing concerning which he gave evidence therein, possesses "immunity" from any such conviction, penalty or forfeiture. A person who possesses such immunity may nevertheless be convicted of perjury as a result of having given false testimony in such legal proceeding, and may be convicted of or adjudged in contempt as a result of having contumaciously refused to give evidence therein.

*McK. Unconsol. Laws § 7507, provides:
In any investigation or hearing conducted by the commission pursuant to this article, relating to any crime or offense with respect to which, by express provision of statute, a competent authority is authorized

which rely on the possibility that his testimony would have been rendered "immune" by virtue of the operation of the Constitution are irrelevant, even if, arguendo, they are correct.* New York has established a route to immunity to which it has required adherence before one may be required to suffer a sanction for not testifying.

Thus, CPL, section 50.20, subd. 2, requires that advice concerning the scope of immunity be given the witness and that competent authority confer the immunity. The failure to adhere to either requirement, precludes sanctioning a reluctant witness. See, People v. Masiello, 28 N.Y.2d 287 (1971). In Masiello, the court at 291, reiterated the statement in People v. DeFeo, 308 N.Y. 596, that immunity is not operative until conferred by the grand jury or some other duly authorized agency mentioned in the statute.** Also see, People v. Ferro, 66 Misc.2d 752, 322 N.Y.S.2d 354, 361 (Crim. Ct. 1971).

New York surely has the right to establish procedures for granting immunity and may designate those persons

(cont.) to confer immunity; the [state] commission [of Investigation] may confer immunity in accordance with the provisions of section 50.20 of the criminal procedure law, but only after affording the attorney-general and the appropriate district attorney the opportunity to be heard in respect to any objections which they may have to the granting of such immunity.

* See, e.g. Uniformed Sanitation Men's Association, Inc. et al v. Commissioner of Sanitation of the City of New York et al;,304 F.Supp. 65 (1969), rev'd 402 F.2d 619 (1970), cert. den.406 U.S.961 (1972).

**The statute referred to is Chapter 11-A of the Code of Criminal Procedure, the predecessor of Art. 50, CPL.

who have the power to grant immunity. New York has done so; it has, by design, limited those who may grant immunity thereby assuring some centralized control in the hands of prosecutor and courts in exercising this power and providing a witness with the basis for knowing when he has received that protection from criminal prosecution which the constitution requires in order that he may no longer rely on his privilege against self-incrimination. Obviously, if the witness is, in fact, coerced, a statement so obtained may not be used against him Garrity v. New Jersey, supra; to suggest that he had to respond to the Commissioner's inquiries because he would be immune from the use of those statements by virtue of a constitutional restriction on use rests on the principle against coercion, not on a grant of immunity. It would require Pasqua to have permitted himself to be "coerced" -- surely an internal contradiction -- and to guess that, under the facts, a court would later hold that he had been coerced. Reliance on Garrity, supra, is misconceived. In Garrity there was no applicable immunity statute. Garrity v. New Jersey, supra, at 495. New York has gone another route. There is a statute and it

establishes the ground rules for conferring immunity. The state cannot have it both ways; i.e., limiting those who may confer immunity and then saying it did not really mean it.*

Petitioner is aware of Uniformed Sanitation Men Association, Inc., et al. v. Commissioner of Sanitation of the City of New York, et al., 420 F.2d 619 (2d Cir.1970) cert. den. 406 U.S.961(1972), which takes a contrary view of New York law. However, the Second Circuit's view of what is the law of New York is not binding on New York and, it is submitted that Judge Harold Tyler's statement of New York law in the District Court opinion in this case, which is in accord with the position taken here, is correct and more persuasive. 304 F.Supp.65 (1969), rev'd 402 F.2d 619 (1970), cert. den., 406 U.S.961 (1972).

Speaking of the New York immunity statute, Judge Tyler stated (304 F.Supp. 65, at 69-70**):

> "In the light of this comprehensive statute of the State of New York, I conclude that the conceded fact that neither Deputy Administrator Spiegel

*The constitutional implications are considered at Point II , infra.

**It is further noted that the Second Circuit's reversal relied on some specific language in the § 619-C of the code of Criminal Procedure which does not appear in Article 50 of the Criminal Procedure Law. Both the specific language of the Criminal Procedure Law (the applicable provision in this case) and the "general scheme" support adoption of Judge Tyler's view.

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nor Special Hearing Officer Leisure was authorized by statute or ordinance to confer immunity is fatal to the proceedings heretofore had in this case.

Furthermore, the Court of Appeals of New York has stated that: "Complete immunity from prosecution may be obtained by a prospective defendant, or any witness, only by strict compliance with the procedural requirements of our immunity statutes properly enacted (Matter of Doyle, 257 N.Y.244, 257-268, 177 N.E. 489, 493-497, 87 A.L.R. 418, Opinion by Cardozo, Ch. J.), or by virtue of immunity provisions in our State Constitution (e. g., Art. XIII, § 3)." People v. Laino, 10 N.Y.2d 161, 173, 218 N.Y.S.2d 647, 657, 176 N.E.2d 571 (1961). Surely,the Supreme Court in this case did not mean to suggest that the defendants should ignore New York law and procedures governing the conferral of immunity so long as they do not offend the federal constitution. The Supreme Court, after all, is well aware of the immunity statutes which have existed in this state and has recognized their crucial significance in other litigation. See, e.g., Regan v. People of State of New York, 349 U.S. 58, at p. 62, 75 S.Ct. 585, at p. 587, 99 L.Ed. 883 (1955); Stevens v. Marks, 388 U.S.234 at pp. 241-242, 86 S.Ct. 788, 15 L.Ed.2d 724 (1966).

Moreover, by asking this court to dismiss the plaintiffs' complaint on the ground that the proceedings by the City after the opinion of the Supreme Court in this case are proper, the defendants in substantial effect are asking a federal court to approve and thereby indirectly confer immunity upon witnesses, a state and local matter of primary concern to the State of New York and the City of New York. In my opinion, sound principles of federalism would be strained if not broken by such a result."

In summary, the legislature of the State of New York has established a procedure to compel testimony from a witness who asserts his privilege against self-

incrimination. In this case, New York failed to follow its own procedure; hence, the witness could continue to assert his privilege. If the result in this case is not palatable to the authorities, they have two obvious remedies: either they could have abided by the statute or the legislature may add to the categories of those empowered to grant immunity, as it has done in the case of the State Commission of Investigation (McK. Unconsol. Laws § 7507).

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POINT II. THE NEW YORK STATUTORY SCHEME FOR CONFERRING IMMUNITY IS VOID-FOR-VAGUENESS AND VIOLATES THE DUE PROCESS CLAUSES OF THE FEDERAL AND STATE CONSTITUTION IF IT PERMITS DISCHARGE OF THE PETITIONER FOR REFUSING TO ANSWER QUESTIONS ASKED BY THE CITY COMMISSIONER OF INVESTIGATION ON GROUNDS OF SELF-INCRIMINATION.

In Point I, petitioner argues that the statutory scheme adopted by New York does not permit imposing a penalty for refusal to testify on self-incrimination unless grounds /competent authority confers immunity and that the City Commission of Investigation is not such "competent authority." Here, petitioner submits that if a contrary view is adopted, that is that Pasqua had to testify or suffer dismissal either because his statement could not have been used against him in a criminal proceeding because the Constitution confers immunity, or that the City Commission is competent authority, the scheme would be void for vagueness under the due process clauses of the federal and state constitutions.

First, there is no assurance that in any specific case, immunity from use or transactional immunity would follow from making the statement.

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As noted in Point I, Garrity deals with statements actually coerced and does not set down a per se rule as to what constitutes coercion in a particular case. This view of Garrity has been confirmed by the highest court of this state. See People v. Glucksman, 35 N.Y.2d 341 (1974). In this case, if Petitioner had testified despite his assertion of his privilege against self-incrimination after he (or his attorney) had demonstrated awareness of the statutory scheme, there is a strong possibility that he could have been found to have voluntarily waived his privilege and his statement would not be deemed coerced.

In addition, it taxes good sense to conclude that New York has deliberately incorporated in its statutory scheme a means of unconstitutionally coercing statements. Lefkowitz v. Turley, U.S. , 94 S.Ct. 316 (1973), is instructive. In that case, the State was held to have violated the due process clauses of the federal constitution when it required a contractor to waive immunity or lose his right to do business with the state. Even though, arguably, Garrity v. New Jersey, 385 U.S. 493, would have held statements made under those circumstances

inadmissible, this was not a sufficient basis to permit the state, where the witness did not testify, to invoke a penalty similar to the one at issue in this case. The Court did not save New York's scheme either by reading into it an immunity not granted or by relying on the possibility the testimony could have been suppressed if offered in a later prosecution. The same principle applies and same result follows in this case. The possibility that Garrity would be a bar to the use of the statement by Pasqua (or the contractor in Turley) does not permit Pasqua's dismissal for refusing to testify (or Turley's loss of contract for refusing to waive immunity).

Second, if it be deemed part of New York law that it was intended that immunity be conferred in this manner, then the petitioner was placed on the horns of an unconstitutional dilemma.* He would be required, under threat of dismissal, either to testify and ignore the clear and complete statutory scheme established by Article 50 of the Criminal Procedure law and confirmed by provisions governing the State Commission of Investigation (McK. Unconsol.

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* The "horns of a dilemma" situation in this case either parallels or is the obverse side of the "rock and the whirlpool" option condemned by the Court in Garrity v. New Jersey, 385 U.S.493, 498 (1966). While in Garrity, it supported a finding of "duress", here it places the witness at risk whichever way he turns: either he may be discharged or fail to preserve his privilege against self-incrimination. A statutory scheme cannot, under the void-for-vagueness doctrine, legislate the "rock and the whirlpool" dilemma.

Laws § 7507), and thereby take the risk that he had not been granted immunity; or he could refuse to testify in reliance on the statutory scheme and then suffer dismissal, because he later learns that there was a silent provision, at odds with the narrow language, which was at work to protect him.

The Supreme Court of the United States has discussed the void-for-vagueness standards in language that is instructive for the case at bar. First, it matters not whether the statute be labelled "penal" or civil, so we need not be detained on this point. Here, the petitioner will be deprived of an important right whichever label is used.

> Both liberty and property are specifically protected by the Fourteenth Amendment against any state deprivation which does not meet the standards of due process, and this protection is not to be avoided by the simple label a state chooses to fasten upon its conduct or its statute. So here this state Act whether labeled "penal" or not must meet the challenge that it is unconstitutionally vague. Giaccio v. Pennsylvania, 382 U.S. 399, 402 (1966).

Third, if the New York scheme is read to include a conferral of immunity by one not expressly authorized by statute to confer it despite the clear contrary language of the statute, it will run afoul of the void-

for-vagueness delinquency. Article 50 of the Criminal Procedure law will not have "give[n] the person of ordinary intelligence opportunity to know what is prohibited, so that he may act accordingly. [It] may trap the innocent by not providing fair warning." Grayned v. City of Rockford, 408 U.S. 104, 108 (1972). Such a result would be contrary to "ordinary notions of fair play". Connally v. General Construction Company, 269 U.S. 385, 391 (1926).

The holding and the problem in Bouie v. City of Columbia, 378 U.S. 347 (1964) particularly supports petitioner's position here. In this case, as in Bouie, if a "narrow and precise" construction of the New York scheme is adopted to include the implicit power to grant immunity by the City Commission of Investigation, it will violate due process.

The Court in Bouie, at pp. 351-52, stated:

> It is true that in the Connally and Lanzetta cases, and in other typical applications of the principle, the uncertainty as to the statute's prohibition resulted from vague or oberbroad language in the statute itself, and the Court concluded that the statute was 'void for vagueness'. The instant case seems distinguishable, since on its face the language. . . is narrow and precise.... The thrust of the distinction, however, is to produce a potentially greater deprivation of the right to fair notice in this sort of case, where the claim that a statute precise on its face has been unforeseeably and retroactively expanded by judical construction, than

> in the typical 'void for vagueness' situation. When a statute on its face is vague or overbroad, it at least gives a potential defendant some notice, by virtue of this very characteristic, that a question may arise as to its coverage, and that it may be held to cover his contemplated conduct. When a statute on its face is narrow and precise, however, it lulls the potential defendant into a false sense of security, giving him no reason even to suspect that conduct clearly outside the scope of the statute as written will be retroactively brought within it by an act of judicial construction. If the Fourteenth Amendment is violated when a person is required 'to speculate as to the meaning of penal statutes,' as in Lanzetta, or to 'guess at [the statute's] meaning and differ as to its application,' as in Connally, the violation is that much greater when, because the uncertainty of the statute's meaning is itself not revealed until the court's decision, a person is not afforded an opportunity to engage in such speculation before committing the act in question.

In summary, while Petitioner maintains that the dismissal should be nullified because it violated New York Law (POINT I, supra), he submits that a construction of New York law which permits dismissal under these circumstances would be unconstitutional for the reasons set forth in POINT II.

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POINT III. RESPONDENT'S DETERMINATION WAS, ON THE ENTIRE RECORD, NOT SUPPORTED BY SUBSTANTIAL EVIDENCE

As was recently reiterated by the New York Court of Appeals in Pell v. Board of Education, 34 N.Y.2d 222, 231 (1974), which involved transferred Article 78 proceedings, "Where, however, a hearing is held, the determination must be supported by substantial evidence (CPLR 7803, subd. 4);.... Rationality is what is reviewed under both the substantial evidence rule and the arbitrary and capricious standard. [citations omitted]." The evidence in this case upon which respondent based findings of guilt clearly does not meet this test. Indeed, the evidence adduced to support the second and third specifications of the charge is at least as insubstantial as that offered in support of the first, which was necessarily and properly dismissed after the hearing.

The second specification contained allegations that the petitioner arranged for an unauthorized visit to an inmate and "knowingly fil[ed] false documents to facilitate the said visits." (R 19). Yet, during the hearing, no witness testified directly concerning falsified documents, nor were any such documents (which, if they existed would presumably be in the custody of

respondent) ever introduced. There was lacking proof even of precisely when the unauthorized visits supposedly occurred. For that matter, there is not even evidence that any visit ever occurred, let alone an unauthorized one. The only evidence to support this specification is the tainted eavesdropping evidence supplied by Detective Munari, who was not present during any significant event and whose voice identification will not suffice.

The evidence in support of the third specification is at least as fatally flawed. This specification alleges that Captain Pasqua provided favored treatment to an inmate, one Aniello Dellacroce, "in return for a case of liquor the said captain received from one Joseph Denti" (R 19). Although the transcript of the taped conversations, suspect as they are, refer to a case of scotch, there is nothing else to indicate who Joseph Denti might be, what his relationship supposedly was to Aniello Dellacroce, or why he would have rewarded Captain Pasqua on Dellacroce's behalf. Simply stated, both specifications are supported by the same questionable, confusing and equivocal transcripts with not a single witness to supply a shred of direct corroborative evidence.

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The evidence in this case is surely no more substantial than that in Brown v. Murphy, 43 A.D.2d 524 (1st Dept. 1973) a case in which this Court unanimously annulled a determination of the New York City Police Commissioner which dismissed the petitioner after a finding of guilt on two specifications. The specifications alleged that urinalysis revealed the presence of cocaine on two occasions. The respondent relied primarily on laboratory reports of the medical unit laboratory. This Court observed:

> Not only was there a failure to offer such evidence through any person with actual knowledge, but a police lieutenant (assigned to the Internal Affairs Division of the Department), was permitted to testify to a conversation he had with the chief chemist of the laboratory for Addictive Drugs, and to state that the chemist had discussed with him the nature of the tests and had stated that they were considered conclusive. Such testimony was clearly hearsay. And, while "Compliance with the technical rules of evidence is not required in disciplinary proceedings" [citation omitted], nevertheless, it has been recognized that under certain circumstances, the receipt of hearsay testimony might be so prejudicial as to "have a tendency to deprive a party of a fair hearing." (Matter of Erdman v. Ingraham, 28 A.D.2d 5, 9). Considering that the charges were based upon the results of the laboratory tests, the admission into evidence of those reports without a proper foundation and permitting hearsay testimony which tended

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to bolster those reports, deprived the petitioner of any meaningful hearing.

Brown v. Murphy, 43 A.D.2d at 525.

The test is correctly stated in Olean v. Levine, 40 A.D.2d 1065 (3d Dept. 1972): "Although the requirements of substantial evidence vary from case to case, there must be a reasonable fulcrum of support in the record to sustain the findings of the administrative agency." The lack of evidentiary support in the instant case surely denied petitioner the "essential element[s] of a fair trial...rendering the administrative determination subject to reversal upon review. (Matter of Sowa v. Looney, 23 N.Y.2d 329, 333)." See Sabatini v. Kirwan, 42 A.D.2d 1022, 1023 (3d Dept. 1973).

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POINT IV. THE PENALTY IMPOSED AGAINST THE PETITIONER WAS SO EXCESSIVELY HARSH AND GROSSLY DISPROPORTIONATE TO THE ALLEGED OFFENSE AS TO CONSTITUTE AN ABUSE OF RESPONDENT'S DISCRETION

As one views the record in this case, it becomes abundantly clear that the punishment imposed against petitioner, dismissal from his position with the accompanying loss of pension rights, is grossly excessive. What was obviously the most serious allegation against him, contained in the first specification, was necessarily dismissed after the hearing by the respondent Commissioner. For the reasons stated in Points I and II, the fourth specification also must fail. Furthermore, petitioner has argued that respondents findings with respect to the second and third specifications were not based on substantial evidence. If this Court should determine, contrary to the petitioner's assertions, that these remaining specifications were satisfactorily proved at the hearing, it should, nevertheless, pursuant to Section 7804(3) of the Civil Practice Law and Rules, find an abuse of discretion as to the measure or mode of penalty or discipline imposed. Of the broad range of punishments available under Section 75(3) of the Civil Service Law - including

reprimand, fine, suspension, or dismissal - the respondent Commissioner has selected the most harsh. Surely the weakness of the evidence in support of the finding plus the minor character of the violations should impel the court to more carefully evaluate the appropriateness of so harsh a penalty.

Writing recently for the Court of Appeals in five transferred Article 78 proceedings involving dismissed public employees, Judge Stevens observed:

> There is no doubt that the reason for the enactment of the statute (CPLR 7803) was to make it possible, where warranted, to ameliorate harsh impositions of sanctions by administrative agencies. That purpose should be fulfilled by the courts not only as a matter of legislative intention, but also in order to accomplish what a sense of justice would dictate. Consideration of the length of employment of the employee, the possibility that a dismissal may leave the employee without any alternative livelihood, his loss of retirement benefits, and the effect upon his innocent family, all play a role, but only in cases where there is absent grave moral turpitude and grave injury to the agency involved or to the public weal. But deliberate, planned, unmitigated larceny, or bribe taking, or demonstrated lack of qualification for the assigned job, is not of that kind. Paramount too, in cases of sanction for agencies like the police, is the principle that it is the agency and not the courts which, before the public, must justify the integrity and efficiency of their operation.
>
> Pell v. Board of Education, 34 N.Y.2d 222, 235, (1974)

Judged by these standards, the result in the instant case is "shocking to one's sense of fairness" and "the sanction imposed is so grave in its impact on the individual subjected to it that it is disproportionate to the misconduct, incompetence, failure or turpitude of the individual or to the harm or risk of harm to the agency or institution, or to the public generally visited or threatened by the derelictions of the individuals." Pell v. Board of Education, 34 N.Y.2d at 234. Indeed, there could hardly be a more appropriate case than this one for the court to accomplish the amelioration of the harsh imposition of a sanction by an administrative agency, in accordance with the very rationale of Section 7803 of the CPLR as enunciated by the Pell court. Considerations deemed relevant by the Court of Appeals such as length of employment (more than twenty-two years), lack of a viably alte ative livelihood and the loss of retirement benefits are certainly present. Perhaps more importantly, the record simply will not support any finding of grave moral turpitude or injury to the respondent Department or to the public good which would make the above mentioned considerations inapplicable. The most intensive scrutiny of the record reveals absolutely no showing of larceny or bribe taking or lack of qualification for the job

petitioner has held for so long with no significant blemish upon his work record. Even if one makes the assumption -- an extraordinarily difficult assumption in view of the quantum and quality of the proof adduced at the hearing -- that petitioner permitted a single unauthorized visit to the Rikers Island facility and that he received a case of scotch, it is virtually ludicrous to conclude that his conduct evinces grave moral turpitude or has caused grave injury to the public.

Decisions in recent years by this Court, even though they preceded the Pell case, are eminently consistent with its teachings. In Smith v. Murphy, 38 A.D.2d 931 (1st Dept., 1972) a New York City police sergeant was dismissed by the Commissioner after a hearing based on a charge of solicitation or acceptance of gratuities. This Court, while making it clear that it did not condone the officer's conduct, held that the punishment of dismissal and the forfeiture of pension rights which the officer had accrued was unreasonably harsh and excessive, observing:

> Nevertheless, petitioner's excellent service of 22 years within the department, 10 of which were as sergeant, prior to the events underlying the charges herein, indicate that the permissible aims of discipline can be achieved effectively by less severe punishment. In the circumstances, the forfeiture of pension rights based on prior satisfactory service is unwarranted. A two year period

EXHIBIT "4" TO MOTION - PLAINTIFF'S STATE COURT BRIEF

> of suspension would satisfy the needs of justice.... Our courts have heretofore revoked sentences of dismissal of employees with records of prior good service and substituted suspension. [Citations omitted]. 38 A.D.2d 931.

Also instructive with regard to an appropriate penalty in Captain Pasqua's case is Tolan v. Murphy, 39 A.D.2d 197 (1st Dept. 1972). In Tolan, a Detective Senior Grade who was a Confidential Clerk in the Identification Section of the New York City Police Department was accused of selling information involving criminal records to a private detective agency. In contrast to the isolated incidents in the instant case, the petitioner had engaged in the conduct for more than two years, with clandestine payments being made to the petitioner's wife. Here too, citing Smith v. Murphy, supra, this Court properly took into account the petitioner's service of almost twenty years and his loss of retirement benefits, and unanimously modified the Police Commissioner's determination to provide for a suspension.

In view of the foregoing, it is respectfully urged that this Court should, in the exercise of discretion, appropriately modify the punishment imposed against the petitioner.

EXHIBIT "4" TO MOTION - PLAINTIFF'S STATE COURT BRIEF

POINT V. EVIDENCE IN SUPPORT OF SPECIFICATIONS TWO AND THREE WAS BASED UPON UNLAWFUL EAVESDROPPING

In the final analysis, respondent's determination of petitioner's guilt as to the second and third specifications is entirely undermined by the fact that it is supported exclusively by eavesdrop evidence which may have been illegally obtained. Article 700 of the New York Criminal Procedure Law contains clear and precise provisions governing eavesdropping warrants. Here, it is questionable whether, in compliance with this Article, a warrant was properly obtained, the application made by an officer authorized to obtain it, or a warrant was issued by a justice. It does not appear whether any warrant was issued at all. Absent such compliance, the very means by which the evidence was obtained would be unlawful under Article 250 of the Penal Law, and Section 4506(1) of the Civil Practice Law and Rules bars its receipt in evidence.

EXHIBIT "4" TO MOTION - PLAINTIFF'S STATE COURT BRIEF

C O N C L U S I O N

Because the dismissal based on specification 4 of the charges was not authorized by law of New York or was unconstitutional or both; and

because the findings of guilty of specifications 2 and 3 were not supported by substantial evidence; and

because the findings of guilty of specifications 2, 3 and 4 were based on illegally obtained evidence or on evidence whose legality should be determined; and

because the penalty of dismissal imposed on petitioner was grossly disproportionate to his guilt of any specification and constituted an abuse of discretion,

Petitioner prays

(a) that the Respondents be directed to perform the duties enjoined upon them by law and the decision of respondent be annulled or modified; and

(b) that the decisions and findings of gult of the specifications be annulled; and

(c) that the petitioner be reinstated in the position that he held prior to his dismissal and be granted back pay from the date of his dismissal; or

EXHIBIT "4" TO MOTION - PLAINTIFF'S STATE COURT BRIEF

(d) that the penalty be modified from dismissal to one more appropriate or that the proceedings be remanded to the respondent for such purpose; or

(e) that the proceedings be remanded for a determination of the legality of the electronic eavesdropping.

Respectfully submitted,
BIAGGI, EHRLICH & LANG
299 Broadway
New York, N.Y. 10007
(212) 233-1178
Attorneys for the Petitioner

BURTON C. AGATA, Of Counsel
and on the Brief
JOHN D. GREGORY, on the Brief

EXHIBIT "4" TO MOTION - PLAINTIFF'S STATE COURT BRIEF

NEW YORK SUPREME COURT,

APPELLATE DIVISION--FIRST DEPARTMENT.

- -X

IN THE MATTER

of

The Application of FRANK PASQUA,

Petitioner,

against

NEW YORK CITY DEPARTMENT OF CORRECTION AND BENJAMIN J. MALCOLM, as Commissioner of NEW YORK CITY DEPARTMENT OF CORRECTION,

Respondents.

- -X

STATEMENT UNDER RULE 5531.

1. The Index Number is 13542/1973.

2. The full names of the original parties are: Frank Pasqua, Petitioner; and New York City Department of Correction and Benjamin J. Malcolm, as Commissioner of New York City Department of Correction, Respondents.

3. This action was commenced in Supreme Court, New York County.

4. This action was commenced by service of a Notice of Petition and Petition on July 19, 1973; The Answer and Return was served on August, 1973.

EXHIBIT "4" TO MOTION - PLAINTIFF'S STATE COURT BRIEF

STATEMENT UNDER RULE 5531

5. Article 78 proceeding seeking review of dismissal and reinstatement of petitioner.

6. Transferred to Appellate Division by consent, August 27, 1973, and order of transferral by Hon. Vincent A. Lupiano.

7. This appeal is being prosecuted on a full record on review.

EXHIBIT "5" TO MOTION - TRANSCRIPT OF QUESTIONING AT DEPARTMENT OF INVESTIGATION

CITY OF NEW YORK

DEPARTMENT OF INVESTIGATION

111 JOHN STREET

NEW YORK, N. Y. 10038

FEBRUARY 5, 1973
2:30 P.M.

INVESTIGATION BEFORE: NICHOLAS SCOPPETTA
COMMISSIONER

EXAMINED BY: STANLEY N. LUPKIN
DEPUTY COMMISSIONER

PRESENT: FRANK MUNARI
DETECTIVE

WITNESS: FRANK PASQUA

PRESENT: GORDON LANG, ESQ.
[Attorney for Witness]
299 BROADWAY,
NEW YORK, N.Y.

SUBJECT: ALLEGATION OF BRIBE RECEIVED AND OTHER IMPROPRIETIES COMMITTED BY DEPARTMENT OF CORRECTION PERSONNEL

CASE NO.: 2916/72

REPORTER: MYRON L. WHITELAW
SUPERVISING SHORTHAND
REPORTER

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EXHIBIT "5" TO MOTION - TRANSCRIPT OF QUESTIONING AT DEPARTMENT OF INVESTIGATION

COMR. LUPKIN: Captain Pasqua, you are here with Mr. Lang who is your attorney as of this moment; is that correct?

THE WITNESS: Yes.

COMR. LUPKIN: And you are here pursuant to subpoena which was served upon you Friday, directing you to appear here this afternoon at 2:00 P.M.; is that correct?

THE WITNESS: Yes.

COMR. LUPKIN: It is my understanding, after a brief conference that I had with your attorney Mr. Lang, in the presence of Detective Frank Munari, that Mr. Lang has explained to you the possibility of a conflict of interest in which he as an attorney may find himself in as a result of representing you. Have you had an opportunity to discuss that matter with Mr. Lang?

THE WITNESS: Yes.

COMR. LUPKIN: Mr. Lang, would you set forth please, if you will, on the record, the reasons that you explained to me earlier with regard to a

EXHIBIT "5" TO MOTION - TRANSCRIPT OF QUESTIONING AT DEPARTMENT OF INVESTIGATION

[Comr. Lupkin cont'g]

possibility of a conflict, and any application that you may have at this adjournment, I would be happy to entertain.

MR. LANG: Commissioner, we appeared initially for Captain Pasqua as a member of the Captain's Benevolent Association. That is a retainer client of my law firm. We represented, as you are aware, at the grand jury, Mr. Pasqua. But again essentially in the role as a member of the Benevolent Association--I think this investigation has reached a point where certain possible conflicts of interest exist regarding the manner in which Mr. Pasqua might proceed at this particular time.

It is my feeling that the decision that he makes could conceivably involve other people and certainly could involve his pension rights and possible criminal exposure. So as to prevent anyone from later saying that any advice I gave him was other than for his own best interest, I would feel that he should have the benefit of the consultation of an attorney who is free from any other associations, so he is to

EXHIBIT "5" TO MOTION - TRANSCRIPT OF QUESTIONING AT DEPARTMENT OF INVESTIGATION

[Mr. Lang cont'g]

assure himself that he is being advised for his own best interest and not because I may have other motives or the implication could be given that I have other motives in the advice that I give him.

COMR. LUPKIN: I assume, Mr. Lang, that you have discussed this matter with Captain Pasqua in detail.

MR. LANG: Well, essentially, yes. I have outlined it on the record, yes.

COMR. LUPKIN: Do you understand what Mr. Lang just said?

THE WITNESS: Yes.

COMR. LUPKIN: And do you, Mr. Lang, have an application in light of what you just said on the Captain's behalf?

MR. LANG: I would respectfully request an adjournment so that Mr. Pasqua can seek the advice of other counsel. Now, as to time, I canonly say to you that we would proceed with all diligence to contact another attorney and make an immediate appointment for him to discuss the case.

EXHIBIT "5" TO MOTION - TRANSCRIPT OF QUESTIONING AT DEPARTMENT OF INVESTIGATION

COMR. LUPKIN: Is that your desire Captain Pasqua?

THE WITNESS: I guess so, yes.

COMR. LUPKIN: I think your application has merit and I am amenable to granting an adjournment of this hearing until this coming Wednesday, which is the 7th of February, 1973, at 2:00 P.M., at which time I would expect that Captain Pasqua would return to this office, either with new counsel or without counsel, but in any event ready to proceed with the hearing for which he was originally subpoenaed.

COMR. LUPKIN: Is that understood Captain?

THE WITNESS: Yes. Can I have a little more time?

COMR. LUPKIN: I'm afraid that I cannot give you any more time than I have already given you. I think two days is more than adequate opportunity for you to sit down with new counsel and to consult with counsel and to return here with counsel on Wednesday, the 7th of February. I am extremely anxious to bring this hearing to fruition and I think that two days is more than adequate time for you to sit down and do what you have to do in order to return here in a fashion prepared to

EXHIBIT "5" TO MOTION - TRANSCRIPT OF QUESTIONING AT DEPARTMENT OF INVESTIGATION

[Comr. Lupkin cont'g]

testify and prepared to answer the subpoena. So that, in light of that application your adjournment is granted and you are directed, pursuant to the very same subpoena, to return here at 2:00 P.M. on February the 7th. That's this coming Wednesday, 1973. Is that understood?

THE WITNESS: Yes.

MR. LANG: Yes. We'll make every effort to do so.

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[WHEREUPON at 2:45 p.m. the proceeding was adjourned]

Reported, transcribed and
checked by: Myron L. Whitelaw-
Orig, and 1 copy - pages 1-6 incl.

EXHIBIT "5" TO MOTION - TRANSCRIPT OF QUESTIONING AT DEPARTMENT OF INVESTIGATION

CITY OF NEW YORK

DEPARTMENT OF INVESTIGATION

111 JOHN STREET

NEW YORK, N. Y. 10038

FEBRUARY 7, 1973
2:05 P.M.

EXAMINATION BEFORE:	NICHOLAS SCOPPETTA COMMISSIONER
EXAMINED BY:	STANLEY N. LUPKIN DEPUTY COMMISSIONER
PRESENT:	FRANK MUNARI DETECTIVE
WITNESS:	FRANK PASQUA
PRESENT:	MUSCHIO WEINGARD & BROUDNY, ESQS. 401 BROADWAY, NEW YORK, N.Y. 224 6820 BY: SAVERIO A. MUSCHIO, ESQ.
SUBJECT:	ALLEGATION OF BRIBE RECEIVED AND OTHER IMPROPRIETIES COMMITTED BY DEPARTMENT OF CORRECTION PERSONNEL
CASE NO.:	2916/72
REPORTER:	MYRON L. WHITELAW SUPERVISING SHORTHAND REPORTER

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EXHIBIT "5" TO MOTION - TRANSCRIPT OF QUESTIONING AT DEPARTMENT OF INVESTIGATION

F R A N K P A S Q U A, having been first duly sworn by Commissioner Lupkin, testified as follows:

BY COMR. LUPKIN:

Q Would you state your full name, your address and your position for the record.

A Name, Frank Pasqua. My title is Captain, Department of Correction.

Q And your home address, please?

A 1234 Kearney Avenue, Bronx.

MR. MUSCHIO: And I think you might tell him that you put in for retirement as of January 5th.

COMR. LUPKIN: Captain Pasqua, you are here pursuant to a subpoena that was served upon you last Friday, and this is a private hearing being conducted by the Department of Investigation of the City of New York, pursuant to Chapter 34 of the New York City Charter.

EXHIBIT "5" TO MOTION - TRANSCRIPT OF QUESTIONING AT DEPARTMENT OF INVESTIGATION

[Comr. Lupkin cont'g]

The investigation in which you are about to testify relates particularly to the affairs, functions, accounts, methods, personnel and efficiency of the Department of Correction of the City of New York.

I wish to advise you, sir, that you have all of the rights and privileges guaranteed by the laws of the State of New York and the Constitutions of this State and of the United States, including the right not to be compelled to incriminate yourself. You have the right to have an attorney present at this hearing, if you wish.

Q Now, is Mr. Saverio Muschio seated alongside of you, your attorney for the purposes of this hearing?

A Yes.

COMR. LUPKIN: I wish further to advise you, sir, that if you refuse to testify or to answer any questions relating to the performance of your official duties, you will be subject to dismissal from your employment with the City.

Q Do you understand that, sir?

A Yes, sir.

EXHIBIT "5" TO MOTION - TRANSCRIPT OF QUESTIONING AT DEPARTMENT OF INVESTIGATION

MR. MUSCHIO: He understands that. But you don't necessarily agree with it?

THE WITNESS: No.

COMR. LUPXIN: However, if you do testify and answer questions, neither your answers or any information or evidence which is gained by reason of such testimony or answers can be used against you in any criminal proceeding.

Q Do you understand that, sir?

A Yes.

COMR. LUPXIN: You are further advised, however, that if you knowingly make any false answers or deceptive statements, you may be subject to criminal prosecution for perjury and other crimes and may also be subject to disciplinary action by reason thereof.

Q Do you understand what I have just said to you?

A Yes.

MR. MUSCHIO: I want to make a statement to the effect that we are declining to answer any questions,predicated on the following grounds: Firstly: Even if the respondent here wanted to answer questions and make truthful answers, there is no way that we can be possibly insulated

EXHIBIT "5" TO MOTION - TRANSCRIPT OF QUESTIONING AT DEPARTMENT OF INVESTIGATION

[Mr. Muschio cont'g]

against the perjury indictment since we have no way of knowing whether or not information which you may have available--and I don't suggest that there is--but in the event that you do, since there is no way of knowing whether that information that you have is available, either by way of witnesses, will in fact be truthful information. Since you very well know that a man's answer predicated on responses made to questions put to him can amount to a perjury if you have sufficient witnesses who even themselves under oath may lie to substantiate or corroborate each other and comply with any two witnesses for such other information. Additionally, too, a witness may or would corroborate that witness' testimony. We have no way of knowing that. And for all intents and purposes he may be telling a truthful answer and find himself subject to an indictment, charged with perjury, Number 1.

The second ground is predicated on the fact that we do not consider this Agency, most respectfully, to be a lawful constituted power to confer immunity, notwithstanding the cases that deal with the subject matter. Since I feel most

EXHIBIT "5" TO MOTION - TRANSCRIPT OF QUESTIONING AT DEPARTMENT OF INVESTIGATION

[Mr. Muschio cont'g]

strongly that in one form or another, the fact that this respondent would be put to answering questions, is another form of testimonial compulsion, and the use of immunity to which you have access to and allege to, I have to disagree. I say you have no such power to confer immunity or any other kind of immunity. That kind of immunity, in my judgment, is not sufficient or broad enough or extensive enough to comply with the statutory mandates of the Constitution of the United States and the State of New York, in that it does not afford him a full Transactional Immunity.

Cases have held that States are not mandated Constitutionally to invoke or oppose statements which require a full Transactional Immunity. However, I feel that this matter has not been newly voiced in the United States Supreme Court on the issue before us, and for the reason here-to-fore suggested, we decline to answer any questions unless we knew beforehand on a written interrogation form, the nature of those questions, so that we can review peruse them and determine then whether or not they are in fact normally

EXHIBIT "5" TO MOTION - TRANSCRIPT OF QUESTIONING AT DEPARTMENT OF INVESTIGATION

[Mr. Muschio cont'g]

representative to the scope of his immunity, and then make determination as to whether or not we want to answer.

COMR. LUPKIN: Are those the grounds upon which your client is refusing to answer my questions?

MR. MUSCHIO: Yes.

COMR. LUPKIN: Is that your statement as well? You have heard what Mr. Muschio has said.

MR. MUSCHIO: The answer to that is, yes.

THE WITNESS: Yes.

COMR. LUPKIN: You understand, do you not, Captain, in the light of what your attorney has just said, the statement which I have just given you with regard to what use your testimony can be put to?

THE WITNESS: Yes.

COMR. LUPKIN: You understand what I have said to you albeit your counsel has entered some question as to whether or not he believes that to be valid. You understand what I've said to you?

THE WITNESS: Yes.

MR. MUSCHIO: No question about it.

EXHIBIT "5" TO MOTION - TRANSCRIPT OF QUESTIONING AT DEPARTMENT OF INVESTIGATION

COMR. LUPKIN: And you understand Captain, that if you do refuse, and I repeat what I have said before, if you refuse to testify or to answer any questions relating to the performance of your official duties, you will be subject to dismissal from your employment with the City. You understand that statement?

THE WITNESS: I understand it.

MR. MUSCHIO: May I most respectfully ask you, do you now wish or is it your intention to propound questions in forms or prepare interrogation or interrogatories which we can see and determine whether or not they are in fact represented normally on the issue of his immunity. We won't know that until we hear the questions. And at that time, having made a response, it may lead to another question and another response which may tend to incriminate him or at least part with information which we don't think you ought to have; certainly not from us. I'm not suggesting that we are in possession of such information but we might say something that might turn out to be information for you later on.

Now, if you are willing to prepare interrogatories and give us an opportunity to study the interrogatories, I'd be happy to come back at a

[Mr. Muschio cont'g]

subsequent date, at your convenience and then decide whether or not the questions are in conformance with the mandates or decision--that is, I need not put them on the record. I'm sure you are well aware of them. At which time we'd be happy to answer questions.

COMR. LUPKIN: In direct answer to your query Mr. Muschio, it is not my intention at this point to put forth any written interrogatories or to give you in advance a statement or a scope as to what the questions that I'm about to put to Captain Pasqua are, other than to state that they do relate to the performance of his official duties with the New York City Department of Correction. I want the record to be explicitly clear. Though I reiterated to you the consequences of your possible refusing to answer questions, let me again reiterate what I did before, lest there be no question about it. And that is, if you do testify and answer question, neither your answers nor any information or evidence which is gained by reason of such testimony or answers can be used against you in any criminal proceeding.

EXHIBIT "5" TO MOTION - TRANSCRIPT OF QUESTIONING AT DEPARTMENT OF INVESTIGATION

[Comr. Lupkin cont'g]

I simply want to know whether or not you clearly understand that statement.

MR. MUSCHIO: Yes. We understand the question. I would just make a final observation, if I may?

COMR. LUPKIN: Surely.

MR. MUSCHIO: It's a matter--or administrative assumption at best, to believe that there is a balance between law enforcement agencies and potential targets or defendants since you have available at your disposal not only broad subpoena powers but investigative sources which we simply do not. And while you are under the impression and firmly believe that you have a right to confer some sort of a use of immunity--and some cases will back you up on that--none-the-less, by reason of the United States District decision, Murphy against the Waterfront Commission, recorded at 378 US, page number escapes me at the moment. It's not made perfectly clear even after reading that decision in conjunction with the more recent decision, Gardner against Broderick and Uniformed Sanitation Worker against Commissioner of Sanitation, but reported in 392 US. It's not really made clear as to whether or not the

[Mr. Moschio cont'g]

utilization of any information imparted to you in response to any questions, could be let and given other agencies not connected with the City of New York or the State of New York, for the purpose of checking him out, and maybe perhaps resulting in criminal prosecutions in other jurisdictions, in which, in my estimation may have no independent source except from the information derived here. And we'd have no way of knowing it. We do not have simply the powers of investigation that you have at your disposal to determine it. And that's my response to your remark.

COMR. LUPKIN: Your objection is noted for the record Mr. Muschio.

MR. MUSCHIO: Thank you very much.

COMR. LUPKIN: Captain Pasqua, how long have you been with the New York City Department of Correction?

MR. MUSCHIO: We're not going to answer any questions.

COMR. LUPKIN: I'd like some response one way or the other to indicate whether he will or not or what the answer is.

MR. MUSCHIO: You're not going to answer any questions. Just say, I'm not going to answer any questions. I have made my opposition clear.

THE WITNESS: I'm not going to answer any questions.

COMR. LUPKIN: And the reason for you not answering those questions are those that your attorney, Mr. Muschio has stated on the record?

THE WITNESS: Yes.

COMR. LUPKIN: Is it also your intention to invoke the Fifth Amendment in relation to your refusal to answer the questions I'm posing to you?

MR. MUSCHIO: Well, we have already stated our reasons on the record and whether we invoke the Fifth Amendment at this point, which most assuredly by my reasons set forth, would encompass that. We certainly do invoke the Fifth Amendment in addition to the reasons I have already stated. So you state on the record that you are now invoking your Fifth Amendment privilege.

THE WITNESS: I'm invoking my Fifth Amendment privilege.

EXHIBIT "5" TO MOTION - TRANSCRIPT OF QUESTIONING AT DEPARTMENT OF INVESTIGATION

COMR. LUPKIN: Captain Pasqua, what duties does your position as a Captain in the Department of Correction call for you to perform?

MR. MUSCHIO: We invoke the privilege, I think, along this line. I think--

COMR. LUPKIN: I understand what you are saying. I'd like to pose some additional questions to make absolutely sure that the Captain does not want to answer any of the questions I'm posing to him.

Q Your answer Captain?

A I'm invoking the Fifth Amendment privilege.

MR. MUSCHIO: Right. In addition to the grounds set forth by counsel.

COMR. LUPKIN: Is that correct, in addition to grounds that Mr. Muschio has set forth on the record?

A Right.

MR. MUSCHIO: Right.

COMR. LUPKIN: Do your duties, Captain, include the arranging of visits for inmates at Rikers Island.

MR. MUSCHIO: Same response.

COMR. LUPKIN: I'd like to have the witness answer.

THE WITNESS: I'm invoking the Fifth Amendment in addition to the other grounds.

Q Do you know or have you ever heard of an inmate by the name of Aniello Dellacroce?

EXHIBIT "5" TO MOTION - TRANSCRIPT OF QUESTIONING AT DEPARTMENT OF INVESTIGATION

MR. MUSCHIO: The same response.

THE WITNESS: The Fifth Amendment privilege.

COMR. LUPKIN: Have you ever met or have you ever spoken to a woman by the name of Rosemary Connelly?

MR. MUSCHIO: Same response.

THE WITNESS: Fifth Amendment privilege in addition to the other grounds set forth.

COMR. LUPKIN: Did you ever have a conversation either with a woman named Rosemary Connelly or a girl by the name of Annette Dellacroce?

MR. MUSCHIO: Same response.

THE WITNESS: I invoke the Fifth Amendment privilege in addition to the other grounds set forth.

COMR. LUPKIN: Do you know or have you ever heard of Richard Curro?

MR. MUSCHIO: Same response.

THE WITNESS: Fifth Amendment. Invoke the Fifth Amendment privilege.

COMR. LUPKIN: Do you know or have you ever heard of a man by the name of Gene Squitieri?

MR. MUSCHIO: Same response.

THE WITNESS: I invoke the Fifth Amendment privilege.

COMR. LUPKIN: Do you know or have you ever heard of a man named Thomas Marino?

MR. MUSCHIO: Same response. And let me interrupt at this point. Commissioner, I have had enough of these hearings to know you know we are not going to answer any questions. There is no reason to pursue it any further. You may have a format or a pattern that you follow but obviously the constant invoking of the privilege and responses is so totally and Wholly unnecessary where you have a general line of questions and/or scope of inquiry which you are seeking to elicit from this witness. I think once we have determined it, that should end. There is no reason to drag it on forever. I'm saying this respectfully now, of course.

COMR. LUPKIN: So long as his response is that which it has been up to this point, it is not my intention obviously, to go through the complete line of questions that I intended to. But certainly, if Captain Pasqua's responses should totally, I certainly will pose all of the questions that I had in mind. I would simply like to cover a number of other areas to determine whether or not Captain Pasqua's response will additionally be that of invoking the Fifth Amendment privilege and the other objections.

EXHIBIT "5" TO MOTION - TRANSCRIPT OF QUESTIONING AT DEPARTMENT OF INVESTIGATION

MR. MUSCHIO: I beg to differ with you. It's a disadvantage to me because it's apparent that the questions are based upon some type of information concerning which I have no knowledge and which, at this point I don't want to know about for the simple reason, it may be necessary for me to defend this man in a future proceeding or some subsequent proceeding, and I don't want to be cast in the light or position of having had knowledge of facts which I must query him about, for the simple reason that if it becomes necessary for me to defend him in some subsequent proceeding, I don't want to be cast in the position where I'm aware of certain facts, which I need not be at this point. Simply because in the event he takes the stand, I don't want to be part of an arrangement that would suggest I'm suborning perjury in the event he testifies to the facts or events concerning which he may have made different answers to me. And for that reason I suggest that we terminate the proceeding because the answers would be uniform all the way down. I'm here. And he certainly doesn't need me here if he's going to answer or make answers differently from what we have already noted on the record.

EXHIBIT "5" TO MOTION - TRANSCRIPT OF QUESTIONING AT DEPARTMENT OF INVESTIGATION

COMR. LUPKIN: For your information, Mr. Muschio, I'm assuming that the Captain's responses will be the same as they have been up to this point. Two additional questions.

MR. MUSCHIO: To which, I'll offer no objection.

COMR. LUPKIN: Captain Pasqua, have you ever been offered by anybody any items of value, including money, a gift, gratuities or a loan from any person, in return for giving favored treatment to any inmate at the Rikers Island New York City Correctional Institution for men.

MR. MUSCHIO: Same response.

THE WITNESS: I'm invoking the Fifth Amendment privilege.

MR. MUSCHIO: In addition to the other grounds set forth.

THE WITNESS: In addition to the other grounds set forth.

COMR. LUPKIN: Have you ever agreed with anybody to deliver or receive a sum of money on behalf of any inmate at the New York City Correctional Institution for men, which money was in payment for a bribe in an effort to secure the conditional release or parole of that inmate.

MR. MUSCHIO: Same response. I'm invoking my--

THE WITNESS: I'm invoking my Fifth Amendment privilege in response, in addition to the other grounds.

EXHIBIT "5" TO MOTION - TRANSCRIPT OF QUESTIONING AT DEPARTMENT OF INVESTIGATION

COMR. LUPKIN: Captain Pasqua, can I assume that your response as you have given to this point to every question that I have asked you, and that is your invocation of your Fifth Amendment privilege and your refusal to answer on that ground and on the other grounds set forth by your attorney, will in fact be your response to any questions that I intend to pose to you during the course of this hearing, and that I would pose to you during the remainder of this hearing?

THE WITNESS: Yes.

COMR. LUPKIN: This hearing now stands concluded. Thank you.

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[WHEREUPON, the hearing was concluded at 2:25 p.m.]

Reported, transcribed and
checked by: Myron L. Whitelaw-
Supervising Shorthand Reporter-
Department of Investigation-
Original and 1 copy - pages 1-18 incl.

DECISION AND ORDER OF WYATT, U.S.D.J.

FRANK PASQUA, Plaintiff,
-v-
NEW YORK CITY RETIREMENT SYSTEM,
and others, Defendants.

76 Civ. 1664

This is a motion for an order "dismissing the above captioned matter". Citation is to Fed. R. Civ. P. 12(b)(1) and (6) which refer to lack of jurisdiction of the subject matter and failure to state a claim. It is not stated for whom the motion is made but it is assumed as made for all defendants. Matters outside the pleading have been presented to and not excluded by the Court and the motion must therefore be treated as one for summary judgment. Fed. R. Civ. P. 12(b)

It is clear that the motion must be granted as to the Retirement System and the Department of Correction. Neither is a "person" under 42 U.S.C. § 1983. Monroe v. Pape, 365 U.S. 167, 187-192 (1961)

This leaves the individual defendant Malcolm.

Plaintiff (Frank) was employed by the City of New York in the Department of Correction. He was dismissed effective April 16, 1973, after a departmental hearing and findings of guilt of infraction of rules and of refusal to testify before the Department of Investigation.

The action is entirely without merit because Frank, having been found guilty after hearing of a refusal to testify, was required to be terminated as an employee of the City of New York. New York City Charter § 1123 Such termination on April 16, 1973, violated none of his constitutional rights. Gardner v. Broderick, 392 U.S. 273, 275 fn. 3, 278 (1968)

Frank's attempt to avoid the consequences of dismissal by retiring voluntarily was to no avail, since his retirement, filed on March 19, 1973, could have been effective no earlier than April 19, 1973, three days after his dismissal. See New York City Administrative Code § B3-36.3(a)

Moreover, Frank litigated his dismissal in an Article 78 proceeding in the state courts. On May 13, 1975, the Appellate Division, First Department, unanimously confirmed the dismissal of Frank and dismissed his petition

(371 N.Y.S.2d 369). Frank did not pursue the matter further in the state courts. The question of his dismissal is thus res judicata in a subsequent federal claim under 42 U.S.C. § 1983. Tang v. Appellate Division, 487 F.2d 138 (2d Cir. 1973), cert. denied 416 U.S. 906 (1974)

It is now claimed, in a memorandum of law submitted for plaintiff, that some of the claims made here were not made in the state court. To the extent that this may be true, if at all, any new claims are frivolous in fact and without merit in law.

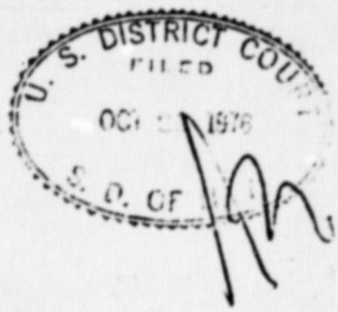
The motion is granted and the Clerk directed to enter judgment in favor of defendants dismissing the action.

SO ORDERED.

Dated: October 27, 1976

INZER B. WYATT
United States District Judge

JUDGMENT APPEALED FROM



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FRANK PASQUA	:	76 Civil 1664 (IBW)
Plaintiff	:	
-against-	:	JUDGMENT
NEW YORK CITY RETIREMENT SYSTEM, NEW YORK CITY DEPARTMENT OF CORRECTION and BENJAMIN J. MALCOLM, as Commissioner of the New York City Department of Correction	:	
Defendants	:	

Defendants having moved the Court pursuant to Rule 12(b)(1) and (6), and the Court having treated the motion as one for summary judgment, pursuant to Rule 56, of the Federal Rules of Civil Procedure, and the said motion having come on to be heard before the Honorable Inzer B. Wyatt, United States District Judge, and the Court thereafter on October 27, 1976, having handed down its memorandum endorsement granting the said judgment, and directing the Clerk to enter judgment, it is,

ORDERED, ADJUDGED and DECREED: That defendants NEW YORK CITY RETIREMENT SYSTEM, NEW YORK CITY DEPARTMENT OF CORRECTION and BENJAMIN J. MALCOLM, as Commissioner of the New York City Department of Correction, have judgment against plaintiff FRANK PASQUA dismissing the complaint.

Dated: New York, N.Y.
October 27, 1976

Raymond F. Burghardt
Clerk

MICROFILM
OCT 29 1976

NOTICE OF APPEAL

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

----------x

FRANK PASQUA,

Plaintiff,

v.

NOTICE OF APPEAL

NEW YORK CITY RETIREMENT SYSTEM; NEW YORK CITY DEPARTMENT OF CORRECTION and BENJAMIN J. MALCOLM, as Commissioner of the New York City Department of Correction,

Defendants.

----------x

Notice is hereby given that FRANK PASQUA, the plaintiff herein, hereby appeals to the United States Court of Appeals for the Second Circuit from the final judgment entered in this action on the 29th day of October, 1976, and from each and every part and the whole of said judgment.

Dated: New York, New York
November 29, 1976

Yours, etc.

JOSEPH W. ALLEN
Attorney for Plaintiff
299 Broadway
New York, New York 10007
(212) 349-6770

NOTICE OF APPEAL

TO:

W. BERNARD RICHLAND
Corporation Counsel
Attorney for Defendants
Office & P.O. Address
Municipal Building
New York, New York 10007

Clerk of the Court
United States Court of Appeals
for the Second Circuit

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

Murray H. Berman, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age and resides at 55 E 10th St NY NY 10003.

That on the 28th day of January, 1977, deponent personally served the within Appendix upon the attorneys designated below who represent the indicated parties in this action and at the addresses below stated which are those that have been designated by said attorneys for that purpose.

By leaving one (1) true ~~copies~~ COPY of same with a duly authorized person at their designated office.

~~By depositing true copies of same enclosed in a post paid properly addressed wrapper, in the post office or official depository under the exclusive care and custody of the United States post office department within the State of New York.~~

Names of attorneys served, together with the names of the clients represented and the attorneys' designated addresses.

W. Bernard Richland
Corporation Counsel
Attorney for Defendants-Appellees
Municipal Building
New York, N. Y.

Murray H Berman

Sworn to before me this
28 day of January, 1977

Michael DeSantis

MICHAEL DeSANTIS
Notary Public, State of New York
No. 03-0930908
Qualified in Bronx County
Commission Expires March 30, 1977